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Res Judicata in Federal Civil Rights Actions Following State Litigation

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Frequently, a federal civil rights action challenging state laws or a state official's conduct follows or is even concurrent with related litigation in state courts. Despite the increasing frequency of this pattern,[1] the effect, as res judiciata, to be given the state litigation remains unsettled. This uncertainty is reflected in the inconsistent approaches found not only between the circuits but as well within a single circuit. Such a state of affairs, especially as it touches so intimately the problem of federal-state relations to which the Supreme Court has of late appeared so sensitive, calls for resolution.

A special tension arises, of course, between an increasingly voracious res judicata,[2] and a sense that federal civil rights actions present demands so special as to overshadow the policies[3] enforced by res judiciata principles.[4]

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[1]The increase in federal civil rights actions is well known and is reported in any number of sources. *See, e.g.*, H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 51 *et seq.* (2d ed. 1973). Insofar as a constant proportion of these cases involves prior state litigation, it is assumed that an increase in the pattern of cases discussed has occurred.

[2]Vestal, *Res Judicata/Preclusion: Expansion*, 47 S. CAL. L. REV. 357 (1974). The author notes a modern procedural trend toward larger units of litigation of which the broadening reach of res judicata is but a part. The most obvious expansion occurs in the enlargement of the concept of "same cause of action" and in the decline of mutuality. The author goes so far as to suggest the estoppel of even nonparties to the first action under certain circumstances.

[3]These policies, expressed as well in Cleary, *Res Judicata Re-examined*, 57 YALE L.J. 339 (1948), as anywhere else, are said to include: prevention of a danger of double recovery; promotion of stable decisions; protections against repeated vexatious litigation; and promotion of court economy. *See also* 1B MOORE'S FEDERAL PRACTICE ¶ 0.405 (2d ed. 1974).

[4]For the most part I will use the terminology favored by the American

In the pages that follow I will portray the confusion that exists in the federal courts, describe the several patterns in which the problem is most apt to surface, and then examine various approaches to solution of the problem.

I. The Present State of Affairs

A. Confusion Below/Silence Above

In the course of foreclosing access to a federal court, at least until related state proceedings were completed, Justice Rehnquist, in *Huffman v. Pursue, Ltd.*,[5] admitted that at the moment of completion of the state proceedings, "normal rules of res judicata and judicial estoppel [might well] operate to bar relitigation in actions arising under 42 U.S.C. § 1983 of the federal issues arising in state court proceedings."[6] If such is the case, the initial rebuff in fact locks the federal court door for all time. However,

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Law Institute in the *Restatement of the Law of Judgments*. "Res judicata" refers to a bundle of doctrines: "bar," "merger," "direct estoppel," and "collateral estoppel."

> If a valid and final personal judgment for money is rendered in favor of the plaintiff, the cause of action is merged in the judgment, and he cannot thereafter maintain an action (see § 47). If a valid and final personal judgment is rendered in favor of the defendant on the merits, the original cause of action is barred by the judgment (see § 48). . . . Where, therefore, the second action is based upon the same cause of action as that upon which the first action was based, the judgment is conclusive as to all matters which were litigated or might have been litigated in the first action.
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> Where, however, the subsequent action is based upon a different cause of action from that upon which the prior action was based, the effect of the judgment is more limited. The judgment is conclusive between the parties in such a case only as to matters actually litigated and determined by the judgment. The judgment is not conclusive as to matters which might have been but were not litigated and determined in the prior action. (See § 68).
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> A judgment, therefore, has not only a direct effect upon the cause of action in which the judgment is rendered was based, by way of merger or bar, but also has a collateral effect upon other causes of action involving the same parties, by way of . . . "collateral estoppel."

RESTATEMENT OF JUDGMENTS, Introductory Note, at 158-59 (1942). Thus bar, merger, and direct estoppel apply where the subsequent case is the same as the first, while collateral estoppel concerns different claims with some common issues.

Use here is also made of Professor Vestal's nomenclature. "Claim preclusion" is essentially synonymous with bar and merger and "issue preclusion" with collateral estoppel. *See* Vestal, *supra* note 2.

[5]420 U.S. 592 (1975).

[6]*Id.* at 606 n.18.

since res judicata had not been raised specifically,[7] the Court was not required to advance beyond the following speculation of Justice Powell, dissenting in *Ellis v. Dyson*:[8]

> The Court has never expressly decided whether and in what circumstances § 1983 can be invoked to attack collaterally state criminal convictions. The resolution of this general problem depends on the extent to which, in a § 1983 action, principles of res judicata bar relitigation in federal court of constitutional issues decided in state judicial proceedings to which the federal plaintiff was a party.[9]

This same postponement can be found in *Preiser v. Rodriguez*,[10] in which Justice Brennan observed:

> [W]e have never held that the doctrine of res judicata applies, in whole or in part, to bar the relitigation under § 1983 of questions that might have been raised, but were not, or that were raised and considered in state court proceedings. The Court correctly notes that a number of lower courts have assumed that the doctrine of res judicata is fully applicable to cases brought under § 1983. But in view of the purposes underlying enactment of the Act—in particular, the Congressional misgivings about the ability and inclination of state courts to enforce federally protected rights, . . .—that conclusion may well be in error.[11]

In the face of such a lack of guidance, the lower federal courts have indeed gone in many directions. A clear majority, however, have assumed that civil rights actions provide no special exceptions to the triumphant principles of res judicata. For example, the Second Circuit barred a federal challenge to a state law limiting hours of outside work for policemen following an unsuccessful attack in state court with the stern comment that "[t]he Civil Rights Act, unlike federal habeas corpus, does not

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[7] *Id.* at 607-08 n.19.

[8] 421 U.S. 426, 437 (1975) (Powell, J., dissenting). Here, too, the question was avoided.

[9] *Id.* at 440.

[10] 411 U.S. 475 (1973). *See also* Wilwording v. Swenson, 404 U.S. 249 (1971) (Burger, C.J., dissenting); Perez v. Ledesma, 401 U.S. 82, 124 (1971). The inconsistency in the lower federal courts is described in the text following, and has already been noted by other commentators. *See, e.g.*, Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723 (1968).

[11] 411 U.S. at 509 n.14 (Brennan, J., dissenting).

permit a second bite at the cherry."[12] A variety of courts have been as explicit in rejecting the contention that civil rights statutes provide some sort of exception to res judicata principles;[13] and the greater number apparently have assumed that res judicata is inexorable.[14]

A few courts, notably in the Fifth Circuit, achieve the same results by treating the federal suit as a quest for appellate review, and, as such, beyond the jurisdiction of the district court. For example, where a school teacher's discharge was unsuccessfully challenged in the Louisiana state courts, the teacher's resort to the federal district court claiming racial discrimination was treated as an invitation to review the work of the state courts.[15] The dismissal for lack of jurisdiction was pinioned on *Rooker v. Fidelity Trust Co.*,[16] a case in which the Supreme Court repulsed a bill seeking to have an Indiana judgment declared void as contravening various constitutional safeguards. Justice Van Devanter characterized the bill as a prayer for appellate review—a jurisdiction, of course, not vouchsafed to the district courts. Other recent cases have also bowed to *Rooker*,[17] but as Judge Rives has noted, such an approach is probably, in light of *Bell v. Hood*,[18] an

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[12]Lackawanna Police Benevolent Ass'n v. Balen, 446 F.2d 52, 53 (2d Cir. 1971).

[13]*See, e.g.*, Thistlethwaite v. City of New York, 497 F.2d 339 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974) (Douglas, J., dissenting); Bricker v. Crane, 468 F.2d 1228 (1st Cir. 1972); Goss v. Illinois, 312 F.2d 257 (7th Cir. 1963); Palma v. Powers, 295 F. Supp. 924 (N.D. Ill. 1969).

[14]*See, e.g.*, Rios v. Cessna Fin. Corp., 488 F.2d 25 (10th Cir. 1973); Hutcherson v. Lehtin, 485 F.2d 567 (9th Cir. 1973); Fisher v. Civil Serv. Comm'n, 484 F.2d 1099 (10th Cir. 1973); Hanley v. Four Corners Vacation Properties, Inc., 480 F.2d 536 (10th Cir. 1973); Metros v. United States Dist. Court, 441 F.2d 313 (10th Cir. 1970); Coogan v. Cincinnati Bar Ass'n, 431 F.2d 1209 (6th Cir. 1970); Howe v. Brouse, 422 F.2d 347 (8th Cir. 1970); Rankin v. Florida, 418 F.2d 482 (5th Cir. 1969); Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321 (6th Cir. 1967); Jenson v. Olson, 353 F.2d 825 (8th Cir. 1965); Hamilton v. Ford, 362 F. Supp. 739 (E.D. Ky. 1973); Wilke & Holzheiser, Inc. v. Reimel, 266 F. Supp. 168 (N.D. Cal. 1967); Connelly v. Balkwill, 174 F. Supp. 49 (N.D. Ohio 1959), *aff'd*, 279 F.2d 685 (1960).

[15]Frazier v. East Baton Rouge Parish School Bd., 363 F.2d 861 (5th Cir. 1966).

[16]263 U.S. 413 (1923).

[17]*See, e.g.*, Jack's Fruit Co. v. Growers Marketing Serv., Inc., 488 F.2d 493 (5th Cir. 1973); Tang v. Appellate Div., 487 F.2d 138 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974); Community Action Group v. City of Columbus, 473 F.2d 966 (5th Cir. 1973); Brown v. Chastain, 416 F.2d 1012 (5th Cir. 1969). *See also* O'Connor v. O'Connor, 315 F.2d 420 (5th Cir. 1963); Kay v. Florida Bar, 323 F. Supp. 1149 (S.D. Fla. 1971).

[18]327 U.S. 678 (1946).

anachronism.[19] It is probably true that the effect of res judicata should be the dispositive factor. Nevertheless, whether the federal suit fails because of res judicata or because it is characterized as a quest for a review not available, the result is the same—loss of access to a federal forum for the purposes of factfinding.

While a distinct minority, some courts have softened the impact of res judicata, either by discerning policies of equal moment competing with, or by regarding section 1983 and similar provisions as exceptions to, normal principles of res judicata. *Ney v. California*[20] is among the more notable cases according section 1983 exceptional status. While there was some doubt as to whether issues raised in Ney's section 1983 action had been determined in his prior state criminal conviction, the Ninth Circuit suggested that, even so, the Civil Rights Act would become a dead letter if parties were estopped by earlier state litigation.[21] Similarly, the Second Circuit, in *Lombard v. Board of Education*,[22] refused to apply res judicata to bar a litigant's section 1983 claim following two previous state proceedings in which plaintiff, a public school teacher, challenged his discharge but failed to raise certain federal constitutional issues now central to his quest for relief. The court worried that to apply res judicata undiluted, especially where the plaintiff's failure to raise the federal issue in the state court precluded federal court review of the state court decision and where, had the plaintiff originated his litigation in the federal district court the likelihood of abstention was high, would be tantamount to a repudiation of the wisdom of *Monroe v. Pape*[23] that the federal civil rights remedy is supplementary to state remedies. To guard against abuse, however, the court was willing to inquire whether the federal plaintiff's failure to raise his federal claims in the state court constituted a waiver in the constitutional sense.[24] There have been also a handful of

[19]Brown v. Chastain, 416 F.2d 1012, 1014 (5th Cir. 1969) (Rives, J., dissenting).

[20]439 F.2d 1285 (9th Cir. 1971).

[21]This view surfaces in other cases as well. For example, the court in Mack v. Florida State Bd. of Dentistry, 430 F.2d 862 (5th Cir. 1970), *cert. denied*, 401 U.S. 960 (1971), allowed a due process challenge in federal court to the fairness of a state license revocation, the impartiality of which had been upheld in Florida courts.

[22]502 F.2d 631 (2d Cir. 1974).

[23]365 U.S. 167 (1961).

[24]Other voices, some only in dissent, have suggested that section 1983 actions ought to be freed of the bindings of res judicata. *See, e.g.*, Thistlethwaite v. City of New York, 497 F.2d 339, 343 (2d Cir.) (Oakes, J., dissenting), *cert. denied*, 419 U.S. 1093 (1974); Tang v. Appellate Div., 487 F.2d 138, 143 (2d Cir. 1973) (Oakes, J., dissenting), *cert. denied*, 416 U.S. 906

decisions which, while less explicit in their rejection of res judicata, have applied it with a unique sensitivity suggestive of a half-way step to outright rejection.[25]

B. Basic Patterns in Which the Res Judicata Problem Arises

The great increase in federal civil rights litigation,[26] the significant number of these cases in which related state litigation is implicated, and the lack of uniformity which prevails in the lower federal courts, all call for authoritative discussion of the problem by the Supreme Court.[27] Indeed, the problem is a real one, touching an area of sensitive federal/state relationships, an area of recent especial concern of the Supreme Court, and lately magnified by developments in the area of abstention and federal equitable relief.

In order more fully to appreciate the federal civil rights plaintiff's potential problem, it is helpful to describe the basic patterns that exist wherein prior state litigation is implicated in federal civil rights claims. Of course, the federal plaintiff, in order to be barred or estopped, must have been a party in the state litigation: either as a civil plaintiff, a civil defendant, or as a criminal defendant.

The plaintiff in the federal court who has also appeared as a plaintiff in the state court is perhaps the least worthy supplicant for relief from the full force of res judicata. A typical situation involves a litigant who has unsuccessfully challenged

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(1974); Brown v. Chastain, 416 F.2d 1012, 1014 (5th Cir. 1969) (Rives, J., dissenting); Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969); Wecht v. Marsteller, 363 F. Supp. 1183 (W.D. Pa. 1973); Howard v. Ladner, 116 F. Supp. 783 (S.D. Miss. 1953).

[25]*See, e.g.*, Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); Parker v. McKeithen, 488 F.2d 553 (5th Cir. 1974); Kauffman v. Moss, 420 F.2d 1270 (3d Cir. 1970); Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963); Duncan v. Town of Blacksburg, 364 F. Supp. 643 (W.D. Va. 1973); Moran v. Mitchell, 354 F. Supp. 86 (E.D. Va. 1973); Olson v. Board of Educ., 250 F. Supp. 1000 (E.D.N.Y. 1966).

[26]*See* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 75-76 n.4 (1973) [hereinafter cited as H. FRIENDLY].

[27]Some of the Justices themselves have recognized the need and have advocated action. For example, in Florida State Bd. of Dentistry v. Mack, 401 U.S. 960 (1971), Justice White and Chief Justice Burger dissented from the denial of certiorari to a suit in which the Fifth Circuit Court of Appeals refused to give res judicata effect to prior state court proceedings. Mack v. Florida State Bd. of Dentistry, 430 F.2d 862 (5th Cir. 1970). *See also* Lauchli v. United States, 405 U.S. 965 (1972) (Douglas, J., dissenting), *denying cert.* to 444 F.2d 1037 (7th Cir. 1971).

state conduct—for example, liquor license revocation,[28] professional license revocation,[29] or discharge from public employment[30] —in a state court and seeks to have the federal court examine the state activity afresh. However, even this basic pattern may have variations. First, the state litigation may have involved the same essential claims, including the constitutional charges, which are now set before the federal court.[31] A second variation involves state litigation attacking the same essential course of conduct but without the constitutional imprecations now made the center of attack.[32] These cases, at least superficially, call for the application of the doctrines of bar, merger, or direct estoppel[33] as the two claims, federal and state, are essentially the same. A third strain of cases involving a state plaintiff occurs where the conduct challenged in the federal court is, at least in part, the state process in which the plaintiff has met with failure.[34] This last model may breed greater sympathy than the usual case of a two-time plaintiff because the alleged offender is the state tribunal itself.

Alternatively, the federal plaintiff may have participated in the state courts as a defendant in civil litigation. In *Duke v. Texas*,[35] appellees were the target of a state court injunction from which they sought relief in a section 1983 action in federal court. The federal plaintiff may have been a defendant in a landlord's action seeking possession,[36] or a party opposing foreclosure,[37] or

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[28]*See, e.g.*, Wilke & Holzheiser, Inc. v. Reimel, 266 F. Supp. 168 (N.D. Cal. 1967).

[29]Mack v. Florida State Bd. of Dentistry, 430 F.2d 862 (5th Cir. 1970), *cert. denied*, 401 U.S. 960 (1971); Flynn v. State Bd. of Chiropractic Examiners, 418 F.2d 668 (9th Cir. 1969).

[30]Lombard v. Board of Educ., 502 F.2d 631 (2d Cir. 1974).

[31]*See, e.g.*, Angel v. Bullington, 330 U.S. 183 (1947); Johnson v. Department of Water & Power, 450 F.2d 294 (9th Cir. 1971); Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321 (6th Cir. 1967); Norman Tobacco & Candy Co. v. Gillette Safety Razor Co., 295 F.2d 362 (5th Cir. 1961); Hamilton v. Ford, 362 F. Supp. 739 (E.D. Ky. 1973); International Prisoners' Union v. Rizzo, 356 F. Supp. 806 (E.D. Pa. 1973).

[32]*See, e.g.*, Rios v. Cessna Fin. Corp., 488 F.2d 25 (10th Cir. 1973) (counterclaiming defendant in state court becomes federal plaintiff); Wilke & Holzheiser, Inc. v. Reimel, 266 F. Supp. 168 (N.D. Cal. 1967).

[33]For a general discussion of these doctrines, see RESTATEMENT OF JUDGMENTS §§ 47 (merger), 48 (bar), 45(d), 49(b), 52(d), 52(g) (1942).

[34]*See* Lombard v. Board of Educ., 502 F.2d 631 (2d Cir. 1974); Brown v. Chastain, 416 F.2d 1012 (5th Cir. 1969); Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969).

[35]477 F.2d 244 (5th Cir. 1973). *See also* Community Action Group v. City of Columbus, 473 F.2d 966 (5th Cir. 1973).

[36]*See, e.g.*, Lovely v. Laliberte, 498 F.2d 1261 (1st Cir. 1974).

[37]*See, e.g.*, Hanley v. Four Corners Vacation Properties, Inc., 480 F.2d

annexation.[38] The possibilities are myriad. The importance of the distinction between the several postures the federal plaintiff assumed in the state court is yet to be discussed. However, whether the stultifying effects of res judicata ought to apply in fullest force, or not at all, may vary with the federal plaintiff's earlier posture, that is, with whether he chose to be in state court or not. As plaintiff, of course, he did; as a defendant, he likely did not. Surely, he did not as a state criminal defendant. The claimed estoppel following a state prosecution can flow from a guilty plea[39] or from matters put in issue and litigated—in a motion to suppress[40] or upon a verdict.[41]

Whatever the posture of the party in the state litigation, surely he will benefit from knowledge of the effects the present litigation may have upon his subsequent efforts in a federal forum. Even the state plaintiff should know the full "costs" of his choice to litigate in the state courts. Likewise, the civil defendant may have several tactics at his disposal—counterclaim, defenses, removal—the wisdom of resort to which will be affected by the extent to which later federal litigation will be influenced by their present use in the state court. The choice to forego raising the constitutional issues in the state forum in order to preserve them for federal exposure is most stark for the state criminal defendant, whose very freedom frequently is at stake. He is put to the hardest choice, which, without some notion of the consequences, is all the more cruel.[42]

C. Res Judicata Problems Arising from Abstention and Related Doctrines

The somewhat incalculable diffidence of the federal courts when constitutional challenges to state law are presented, especially

536 (10th Cir. 1973); Hardy v. Northwestern Fed. Sav. & Loan Ass'n, 254 F.2d 70 (D.C. Cir. 1957).

[38]*See* Duncan v. Town of Blacksburg, 364 F. Supp. 643 (W.D. Va. 1973).

[39]*See, e.g.*, Metros v. United States Dist. Court, 441 F.2d 313 (10th Cir. 1970).

[40]*See* Moran v. Mitchell, 354 F. Supp. 86 (E.D. Va. 1973).

[41]*See* Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); Williams v. Liberty, 461 F.2d 325 (7th Cir. 1972).

[42]Courts have recognized this Hobson's choice in ameliorating the impact of res judicata in a subsequent section 1983 action. *See, e.g.*, Moran v. Mitchell, 354 F. Supp 86 (E.D. Va. 1973). *See also* Comment, *The Collateral Estoppel Effects of State Criminal Convictions in Section 1983 Actions*, 1975 U. ILL. L.F. 95; 88 HARV. L. REV. 453 (1974). Of course, the convicted defendant may have the habeas corpus avenue left open, but this does not compensate for the loss of the damage remedy provided by the civil rights acts. See Preiser v. Rodriguez, 411 U.S. 475 (1973), for consideration of the relationship between habeas corpus and section 1983.

as part of a quest for injunctive or declaratory relief, a diffidence loosely grouped under the "abstention doctrines," further confounds the potential civil rights litigant. For example, a state plaintiff protesting a discharge files a claim in federal court and is met with abstention, the federal court deeming the matter one of unsettled state law a clarification of which might avoid the federal constitutional questions. Relegated to the state court, the state plaintiff makes the mistake of litigating all his claims, federal and state. When, upon losing in the state court, he returns to the federal forum, he is likely to be met with the defense of res judicata.[43] Of course, such a party has a chance of federal court review, if only by certiorari. But the federal fact-finding forum has been lost.

A related snare involves the state plaintiff who, anticipating abstention in the federal court and the res judicata effect of prior state litigation, goes first to the state forum but explicitly reserves his federal questions for federal treatment. Again, normal principles of bar or merger will cut off any chance for a federal airing of his federal claim.[44] Such a litigant, not having injected the federal question in the state case, lacks even the solace of possible Supreme Court review. Justification of initial and full resort to state courts by contending that resort to federal court would have been hollow since the federal court would have abstained in any case apparently will not succeed.[45] However, at least one federal court has expressed sympathy with a plaintiff's initial resort to state court when abstention is to be anticipated, suggesting that such a process is timesaving in that one step, initial resort to federal court, is cut out.[46]

Nevertheless, whatever its efficiency, the formula laid down over a decade ago by the Supreme Court in *England v. Louisiana State Board of Medical Examiners*[47] remains the rule. That is, if upon resort to the federal court, abstention seems proper, the court is, with rare exception,[48] to retain jurisdiction but send the litigants to the state court where the federal questions are to be reserved. In the state court the federal issues should be exposed only to give the state court the benefit of knowing the full range of issues impli-

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[43]*See, e.g.*, Fisher v. Civil Serv. Comm'n, 484 F.2d 1099 (10th Cir. 1973).

[44]*See, e.g.*, Wilke & Holzheiser, Inc. v. Reimel, 266 F. Supp. 168 (N.D. Cal. 1967).

[45]*See* Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321 (6th Cir. 1967).

[46]Lombard v. Board of Educ., 502 F.2d 631 (2d Cir. 1974), *noted in* 88 HARV. L. REV. 453 (1974).

[47]375 U.S. 411 (1964).

[48]*See, e.g.*, Harris County Comm'rs Court v. Moore, 420 U.S. 77 (1975).

cated. But, "if a party freely and without reservation submits his federal claim for decision by state courts,"[49] then he has elected to forego return to the federal court.

Unless, then, some soft form of res judicata is to apply to civil rights actions, a litigant desiring an original federal forum for his federal claim must always resort first to the federal court even if abstention will likely postpone his federal hearing, and he must take care to comply with the strictures of *England*. State court defendants, civil or criminal, have no such opportunities, except as removal might provide—a provision which in the case of a criminal defendant is, at best, a remote possibility. In effect, then, state court litigants face an exhaustion requirement in the state courts, which when capped by res judicata deprives them of a federal forum.[50]

This problem is further exacerbated by the increasing restraint which the Supreme Court has laid upon lower federal courts in which injunctive relief is sought. The developments in this area in the constellation of cases surrounding *Younger v. Harris*[51] have been carefully traced elsewhere.[52] It is sufficient for present purposes to relate that while section 1983 of the Civil Rights Act was recognized as an exception to the Anti-Injunction Act[53] which forbids federal courts to enjoin state court proceedings, the Court made it clear that only in the most unusual cases, cases of egregious bad faith, would enjoining pending state criminal cases be permissible. A similar restraint is to control the grant of declaratory relief affecting pending criminal actions. When state prosecution is not pending, but only threatened, the opportunity for federal injunctive or declaratory relief, while still a sensitive matter of equity and federal/state comity, is greater,[54] but in any case, the discretionary element always present in the grant of declaratory or equitable relief may leave the federal plaintiff without a federal forum until it is too late.

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[49]375 U.S. at 419.

[50]*See* H. FRIENDLY, *supra* note 26, at 101-07.

[51]401 U.S. 37 (1971). *See also* Byrne v. Karalexis, 401 U.S. 216 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Samuels v. Mackell, 401 U.S. 66 (1971).

[52]*See generally* H. FRIENDLY, *supra* note 26, at 96-100; McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections*, 60 VA. L. REV. 1, 250 (1974).

[53]28 U.S.C. § 2283 (1970). *See* Mitchum v. Foster, 407 U.S. 225 (1972).

[54]Steffel v. Thompson, 415 U.S. 452 (1974), suggests that in such a case, declaratory relief should emanate under the normal discretionary considerations for the granting of such relief. Likewise, injunctive relief will issue upon a showing of irreparable harm. *See* Dombrowski v. Pfister, 380 U.S. 479 (1965).

Latest developments in this area threaten further to confound the litigant. Any hope that the showing required by *Younger* to ignite federal injunctive or declaratory relief in the face of pending state criminal litigation would be minimal was put to rest in the last Term.[55] In fact, the impact of *Younger* was significantly extended to state noncriminal proceedings as well as to state prosecutions begun soon after the federal civil rights claim has been commenced.

In *Huffman v. Pursue, Ltd.*,[56] local state officials, pursuant to a state public nuisance statute, instituted proceedings to seize appellee's film as obscene as well as to close down appellee's theater. The state court found the film to be obscene. Rather than appeal the state decision, the appellee instituted a section 1983 action attacking the statute and its application. A three-judge federal court granted relief, but the Supreme Court, through Justice Rehnquist, held the principles of *Younger* to govern. While recognizing that the state proceedings were civil in nature, the Court understood them to be in many respects akin to criminal proceedings, so much so that the federal court interference would have the same impact as the enjoining of state criminal actions. More startling, however, was the Court's response to appellee's contentions that since the state proceedings were completed, the state interests promoted by *Younger* had vanished. To the contrary, "we believe that a necessary concomitant of *Younger* is that a party . . . must exhaust his state appellate remedies before seeking relief in the District Court."[57]

Moreover, the appellee was admonished that this extension of *Younger* could not be avoided "by simply failing to comply with the procedures of perfecting its appeal"[58] within the state judicial system. The implication left is that if the appellee has failed to perfect an appeal in a timely fashion, the appellee is out of luck at all turns. But even if he has exhausted his remedies in the state system, what succor may be found in the federal court if normal principles of res judicata apply? Again, in *Huffman* the Court suggested, but did not confirm, the possibility that res judicata will foreclose federal court consideration of his federal claims.[59] Therefore, as the federal courts are required to shunt more cases to the state system, the cost will be the loss

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[55]*See, e.g.*, Kugler v. Helfant, 421 U.S. 117 (1975).

[56]420 U.S. 592 (1975). Three justices dissented.

[57]*Id.* at 608.

[58]*Id.* at 611 n.22.

[59]*Id.* at 606 n.18, 607-08 n.19.

of a federal fact-finding forum[60]—unless normal principles of res judicata are found not applicable.

In *Hicks v. Miranda*,[61] *Younger* principles were extended to federal civil rights actions begun before any state prosecution, at least where the federal litigation has not progressed beyond an embryonic state, that is "before any proceedings of substance on the merits have taken place in the federal court."[62] As suggested by Justice Stewart in dissent, such a rule "is an open invitation to state officials to institute state proceedings in order to defeat federal jurisdiction."[63] If res judicata applies fully, the "defeat" is total, unless a basis for habeas corpus relief exists.[64]

II. The Role of Statutory Full Faith and Credit

The fundamental pattern with which we are concerned involves state court litigation followed by related federal court civil rights litigation. The question to be resolved is what effect or credit is to be given the state action in the subsequent federal action. At least superficially, it appears that Congress had undertaken to provide an answer to that question.

> Such Acts, records and judicial proceedings [of any State, Territory, or Possession of the United States] or copies thereof . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.[65]

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[60]The Supreme Court recognized this interest as real in England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416 (1964).

[61]422 U.S. 332 (1975). *See also* Doran v. Salem Inn, Inc., 422 U.S. 922 (1975).

[62]422 U.S. at 349.

[63]*Id.* at 357 (Stewart, J., dissenting).

[64]The relationship between habeas corpus and section 1983 remedies is somewhat hazily drawn in Preiser v. Rodriguez, 411 U.S. 475 (1973). If one is attacking custody, then habeas corpus, which requires exhaustion of state remedies, is the proper mode; if damages for the conditions of custody are sought, then section 1983 is open—as long as the federal court does not abstain. Dangers, however, inhere in the pursuit of both remedies at once: the efforts to exhaust state remedies as a precondition to habeas corpus may result in state judgments estopping the section 1983 claim if the conviction underlying the custody has not already done so.

[65]28 U.S.C. § 1738 (1970). The first two paragraphs of the statute provide:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by af-

The statutory full faith and credit provision is an old law. Its essential provisions have remained virtually unchanged for 185 years.[66] The force of statutory full faith and credit was early litigated in *Mills v. Duryee*,[67] in which Francis Scott Key's contention that sister state judgments need only be credited as evidence was rejected by the Supreme Court through Justice Story. That sister state judgments worthy of full faith and credit are entitled to be viewed as res judicata and to receive the same force and effect as they would in the courts of the state where they were rendered was thus established as the intendment of the full faith and credit statute. Supreme Court holdings in this regard have been generally consistent to the present. Justice Story's view was reiterated by Justice Marshall in *Hampton v. McConnel*,[68] the holding of which was described as essentially intact in 1942.[69] Nothing has occurred since *Hampton* to disturb the general rule.

Essentially, the statute makes "that which has been adjudicated in one state res judicata to the same extent in every other."[70] It seems correct to say that the "full faith and credit implemented by federal statute (28 U.S.C. § 1738) is the means by which state adjudications are made res judicata."[71] Moreover, as the statute by its terms demands, the usual rule where full faith and credit is due is "that the precise extent to which a judgment rendered in another state is conclusive as to both the rights of the parties and the facts involved, is determined by the law of the state in which

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fixing the seal of such State, Territory, or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

[66]The provision was first enacted in 1790, Act of May 26, 1790, 1 Stat. 122; slight modifications occurred in 1804, Act of March 27, 1804, 2 Stat. 298, and again in 1948, Act of June 25, 1948, ch. 646, 62 Stat. 947. *See generally* Costigan, *The History of the Adoption of Section 1 of Article IV of the United States Constitution*, 4 COLUM. L. REV. 470 (1904); Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV (1945). Debate at the Convention, and in the ratification debates was brief, cryptic, and uninformative. Only *The Federalist, No. 42* makes brief mention of the constitutional clause. Nevertheless, it was widely deemed an essential aspect of a firm union.

[67]11 U.S. (7 Cranch) 302 (1813).

[68]16 U.S. (3 Wheat.) 110 (1818).

[69]Williams v. North Carolina, 317 U.S. 287, 294 (1942).

[70]Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 438 (1943).

[71]Batiste v. Furnco Constr. Co., 503 F. 2d 447, 450 (7th Cir. 1974). *See generally* Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Court*, 66 MICH. L. REV. 1723 (1968).

the judgment was rendered."[72] That is, "[w]hether the judgment of a state is *res judicata* [in a federal court] is a question of state law."[73] Thus, in *American Surety Co. v. Baldwin,*[74] a surety on a supersedeas bond called upon to pay its principal's judgment challenged unsuccessfully the entry of judgment against it in Idaho state courts. The company then sought relief in federal district court, raising, among other things, the constitutional fairness of the state proceedings—a matter not raised in the state courts. Justice Brandeis answered: "[T]he federal remedy was barred by the proceedings taken in the state court which ripened into a final judgment constituting *res judicata.*"[75] Moreover, the determination of the effect of the judgment as res judicata was to be guided by Idaho law.[76]

The proper scope and application of section 1738 is, therefore, not unduly clouded. Nevertheless, despite the fact that the construction of statutory full faith and credit has survived apparently unchanged from *Mills,*[77] as Justice Jackson noted about the parallel constitutional clause, "judges not infrequently decide cases to which it would apply without mention of it."[78] Occasionally, the failure to attend the statute arguably breeds the wrong result—as in *Howard v. Cadner,*[79] where the court's half-truth—that res judicata is a matter of federal law[80]—led it to ignore prior related state litigation. Equally perplexing is the discussion in *Parker v.*

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[72]H. GOODRICH & E. SCHOLES, CONFLICT OF LAW 408 (4th ed. 1964). *See also* RESTATEMENT (SECOND) OF CONFLICTS §§ 94-97 (1971).

[73]Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 309 U.S. 4, 11 (1939) (Hughes, C.J., concurring) .

[74]287 U.S. 156 (1932).

[75]*Id.* at 164.

[76]*Id.* at 166. *See also* Angel v. Bullington, 330 U.S. 183 (1947).

[77]*See, e.g.*, Carroll v. Lanza, 349 U.S. 408 (1955); St. John v. Wisconsin Employment Relations Bd., 340 U.S. 411 (1951); United Nat'l Bank v. Lamb, 337 U.S. 38 (1949); Riley v. New York Trust Co., 315 U.S. 343 (1942); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); Treines v. Sunshine Mining Co., 308 U.S. 66 (1939); Davis v. Davis, 305 U.S. 32 (1938); Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912); Union & Planters' Bank v. City of Memphis, 189 U.S. 71 (1903); Hancock Nat'l Bank v. Farnum, 176 U.S. 640 (1900); Embry v. Palmer, 107 U.S. 3 (1882); McElmoyle v. Cohen, 38 U.S. (13 Pet.) 270 (1839).

[78]Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution,* 45 COLUM L. REV. 1, 3 (1945).

[79]116 F. Supp. 783 (S.D. Miss. 1953).

[80]Of course the scope of section 1738 is a matter of federal law, but it refers to state law, with federal law supplying some kind of outer limits. Within those limits, the law of the first forum controls.

McKeithen,[81] in which the court described itself as uncertain as to whether the effect of prior state litigation is to be governed by principles of collateral estoppel or the strictures of section 1738. Presumably, as the prior discussion indicates, the statute controls and guides one to the application of state collateral estoppel principles.

Most frequently, a court, whose decision may be otherwise unobjectionable, proceeds without mention of the statute, often citing federal cases for the determination as to the proper scope of res judicata.[82] Even the Supreme Court is not free from this oversight.[83] Whatever the reasons for the frequent inattention to the statute, by its express terms, it appears to control the question of the extent to which prior state litigation is to be honored in related federal litigation. Therefore, one arguing that res judicata ought not to apply in federal civil rights actions must confront the meaning and compulsion of section 1738.

As Justice Douglas has reminded us, "*res judicata* is not a constitutional principle."[84] At the same time, the statutory command of full faith and credit contains no express exceptions. Hence, the question is whether an implied exception to section 1738 can be justified. Not a few jurists and commentators have recommended that indeed civil rights actions are, or ought to be, exceptions to section 1738. Mr. Justice Douglas, dissenting from a denial of certiorari, thought it clear that collateral estoppel principles are as inappropriate in civil rights actions as in habeas corpus proceedings.[85]

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[81]488 F.2d 553 (5th Cir. 1974). In Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir.), *appeal dismissed sub nom.* Metropolitan Dade County v. Aerojet-General Corp., 96 S. Ct. 210 (1975), the court held that the law of the jurisdiction rendering the decision urged as res judicata governs its effect. Hence if the first litigation was in a federal court, even in diversity, federal law is held to govern its future effect. This pattern raises unique *Erie* problems.

[82]*See, e.g.*, Thistlethwaite v. City of New York, 497 F.2d 339 (2d Cir.), *cert denied*, 419 U.S. 1093 (1974); Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321 (6th Cir. 1967); Frazier v. East Baton Rouge Parish School Bd., 363 F.2d 861 (5th Cir. 1966); Chesapeake Indus., Inc. v. Wetzel, 265 F.2d 881 (6th Cir. 1959).

[83]*See, e.g.*, Grubb v. Public Util. Comm'n, 281 U.S. 470 (1930); Phelps v. Harris, 101 U.S. 370 (1879).

[84]England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 429 (1964) (Douglas, J., concurring).

[85]Lauchli v. United States, 405 U.S. 965 (1972) (Douglas, J., dissenting), *denying cert. to* 444 F.2d 1037 (7th Cir. 1971). *See also* Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (Brennan, J., dissenting); Preiser v. Rodriguez, 411 U.S. 475 (1973) (Brennan, J., dissenting); Lombard v. Board of Educ., 502 F.2d 631 (2d Cir. 1974); Mastracchio v. Ricci, 498 F.2d 1257

Those who would find federal civil rights actions as exceptions to the full faith and credit statute argue from the unique nature of the nineteenth century civil rights acts. In recognizing section 1983 as an exception to the Anti-Injunction Act,[86] the Supreme Court in *Mitchum v. Foster*[87] described the legislative history of the Civil Rights Act of 1874, of which the present section 1983 was section 1, as revealing Congress' intent to alter significantly "the relationship between the States and the Nation with respect to the protection of federally created rights"; that, in fact, the antipathy of state officers, including state judicial officers, could only be avoided by access to a federal forum; and that section 1983, *inter alia,* must be considered a unique federal remedy, supplementary to other traditional remedies that might be available.[88] From the Court's view of section 1983, a view that can be fairly described as orthodox, it is said to follow that a special or no type of res judicata ought to operate in federal actions based upon the section.

It is not necessary here to describe in detail nor to evaluate the special nature of civil rights statutes. It is sufficient for the purposes of this discussion to note it, and to further note that the rationale of cases such as *Mitchum* carries plausibly over to the problem with which we are concerned—the effect of res judicata and of section 1738 in civil rights actions. Many agree that the matter should be settled,[89] one way or another.

The remainder of this Article will consider the developed contours of section 1738, with an eye to sketching alternative ra-

(1st Cir. 1974), *cert. denied,* 420 U.S. 909 (1975); Thistlethwaite v. City of New York, 497 F.2d 339, 343 (2d Cir.) (Oakes, J., dissenting), *cert. denied,* 419 U.S. 1093 (1974) (Douglas, J., dissenting); Brown v. Chastain, 416 F.2d 1012, 1014 (5th Cir. 1969) (Rives, J., dissenting); McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections,* 60 VA. L. REV. 1, 250 (1974); 43 FORDHAM L. REV. 459 (1974); 88 HARV. L. REV. 453 (1974); 1974 WIS. L. REV. 1180. Perhaps note should also be made of comments, such as those appearing in England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416 (1964), which recognize the lack of an adequate substitute for federal factfinding.

[86]28 U.S.C. § 2283 (1970).

[87]407 U.S. 225, 242 (1972).

[88]*See also* Zwickler v. Koota, 389 U.S. 241 (1967); Monroe v. Pape, 365 U.S. 167 (1961); McNeese v. Board of Educ., 373 U.S. 668 (1963). McCormack, *supra* note 85, contains a valuable and comprehensive discussion of the impact of section 1983 upon the federal balance. *See also* Averitt, *Federal Section 1983 Actions After State Court Judgments,* 44 U. COL. L. REV. 191 (1972).

[89]*See, e.g.,* Florida State Bd. of Dentistry v. Mack, 401 U.S. 960 (1971) (Burger, C.J. & White, J., dissenting), *denying cert. to* 430 F.2d 862 (5th Cir. 1970).

tionales for making civil rights actions total or partial exceptions to the normal effect of the section. Such an examination may reveal that there exist already sufficient precedent and doctrinal bridgework to justify treating civil rights actions specially—either by ignoring any res judicata effect of prior state litigation or by according it only limited force.

III. Exceptions to Section 1738

A. General Considerations

As was noted earlier, res judicata is not a "constitutional principle."[90] It is generally conceded that overriding public policy or the peril of injustice may mitigate or banish the effects of res judicata. As Professor Moore states, res judicata is a salutary principle, "but at times there is considerable truth in the observation that res judicata renders white black, the crooked straight."[91]

Despite statements of the Supreme Court that "we are aware of no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*,"[92] as the following discussion will demonstrate, there are several recognized exceptions or qualifications to the effects of res judicata as applied through full faith and credit. For example, considering the obligation to accord full faith and credit to a state tax judgment that was arguably penal in nature, the Court declared:

> Such exception as there may be to this all-inclusive command [of full faith and credit] is one which is implied from the nature of our dual system of government, and recognizes that consistently with the full faith and credit clause there may be limits to the extent to which the policy of one state, in many respects sovereign, may be subordinated to the policy of another.[93]

Surely, if one state's policy may justify rejection of another's judgment, then "well-defined federal policies, statutory or constitutional, may compete with those policies underlying section 1738."[94]

Almost three decades ago, Professor Cleary remarked that the frequent apologies that accompany res judicata applications

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[90]See text accompanying note 84 *supra*.

[91]1B Moore's Federal Practice ¶ 0.405 [12], at 787 (2d ed. 1974).

[92]Heiser v. Woodruff, 327 U.S. 726, 733 (1946).

[93]Milwaukee County v. M.E. White Co., 296 U.S. 268, 273 (1935).

[94]American Mannex Corp. v. Rozands, 462 F.2d 688, 690 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972).

suggested a need for re-examination of the principles.[95] For the most part, of course, his call has not been heeded. Quite to the contrary, res judicata's preclusionary tide has been rising.[96] Nevertheless, where special circumstances suggest the need, at least in one narrow inlet, to pull against that tide, Cleary's insight into the underlying rationales of res judicata is worth rehearsing. He found four major needs which the doctrine was supposed to serve: (1) avoiding a danger of double recovery, (2) promoting stability of law, (3) protecting against vexatious litigation, and (4) supporting efficient use of the courts.

Each of these is a worthwhile end, which at times may be outweighed by competing values, such as the assurance of a real day in court, or may be subserved as well by a more discriminating application of res judicata. For example, if the evil to be avoided is double recovery, the second court may examine the record to see if double recovery is indeed sought. If not, at least one justification for barring the second action may be set aside. In considering the extent to which a federal court must attach conclusive effect to prior state court proceedings, it is well to keep in mind that what is involved is a federal question[97] enwrapping a state law question in the same fashion as in the determination of the law to be applied in diversity suits. That is, while section 1738 commands reference to state law principles of res judicata, federal law governs the timing and scope of that command and fixes the outer limits permitted to a state's preclusionary rules. Therefore, the weighing and choosing of competing values is, in the first instance at least, a federal equation in which the state rules of res judicata operate as a known component.

A frequent proposal made by courts[98] and commentators[99] is that federal civil rights actions should operate as exceptions to section 1738, or, at the least, call forth a more discerning and sensitive approach to the question of the preclusionary effect of prior related state court litigation. What are the recognized exceptions to section 1738 and the application of res judicata?

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[95]Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339 (1948).

[96]*See, e.g.*, Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 172 (1968); Vestal, *Res Judicata/Preclusion: Expansion*, S. CAL. L. REV. 357 (1974).

[97]*See, e.g.*, Adams v. Saenger, 303 U.S. 59, 64 (1938); Cheatham, *Res Judicata and the Full Faith and Credit Clause: Magnolia Petroleum Co. v. Hunt*, 44 COLUM. L. REV. 330, 341 (1944).

[98]*See, e.g.*, Ney v. California, 439 F.2d 1285 (9th Cir. 1971), and cases cited notes 24 & 85 *supra*.

[99]*See, e.g.*, Averitt, *supra* note 88.

B. Some Established Exceptions to Res Judicata in Section 1738 Cases

Of course, it has long been textbook law that the second forum may examine the jurisdictional bases of the first forum and that a judgment rendered without jurisdiction is not entitled to credit.[100] On the other hand, if jurisdiction has been or could have been litigated in the first forum, later litigation typically will be precluded.[101]

Having noted these general principles, and granting that the "explicit direction [of section 1738] should be disregarded by the Supreme Court only on very strong grounds,"[102] we may turn to an examination of exceptions.

In *Durfee v. Duke*,[103] a suit to quiet title to river bottom land was commenced in a Nebraska court. The court's power depended on the situs of the land, which in turn depended on whether the river had shifted course by avulsion or accretion. The Nebraska court found it had jurisdiction. The disappointed party then sued in a Missouri court to quiet title, claiming the land to be in Missouri. Upon removal, the federal district court thought the issue concluded by the first suit. The Eighth Circuit reversed. In the Supreme Court, Justice Stewart noted first the general rule:

> Full faith and credit thus generally requires every state to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it.[104]

Yet, the Justice continued, in some cases, although *Durfee* was not one of them, countervailing considerations may be present which justify a subordination of the res judicata principles: that is, the policies underlying res judicata may be outweighed by that against permitting the court to act beyond its jurisdiction.[105] Thus *Durfee* introduced the notion that there are inter-

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[100]*See, e.g.*, Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); Armstrong v. Armstrong, 350 U.S. 568 (1956); Fauntleroy v. Lum, 210 U.S. 230 (1908); Christmas v. Russell, 72 U.S. (5 Wall.) 290 (1866).

[101]*See, e.g.*, Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940); Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931); McCormick v. Sullivant, 23 U.S. (10 Wheat.) 192 (1825).

[102]Cheatham, *supra* note 97, at 374. *See also* Annot., 88 L. Ed. 389 (1944).

[103]375 U.S. 106 (1963).

[104]*Id.* at 109.

[105]*Id.* at 114, *citing, inter alia*, RESTATEMENT OF JUDGMENTS § 10 (1942); RESTATEMENT OF CONFLICT OF LAWS § 451(2) (Supp. 1948). For a statement of the general rule, see United States v. Silliman, 167 F.2d 607, 614 (3d Cir. 1948).

ests sufficient to override the preclusive effect of prior state litigation, interests of unique federal concern, touching not only upon the limited role of article III courts, but as well, for example, upon patents. Thus, in *Mercoid Corp. v. Mid-Continent Investment Co.*,[106] the Court refused to accord the full bar of res judicata where to have done so would have involved the Court in "placing its imprimatur on a scheme which involves a misuse of the patent privilege and a violation of the anti-trust laws."[107]

Perhaps the best known of cases in which competing policies submerge those of res judicata is *Commissioner v. Sunnen.*[108] In *Sunnen,* the Supreme Court explicated the peculiar problems created by the undiluted application of res judicata in tax cases. Where collateral estoppel would promote inequality between similarly situated, even competing, taxpayers, the general principles of res judicata must give way.[109] The special predicament of tax cases was well enough known so that the lower federal courts, even before the major exposition of *Sunnen,* had recognized the need for special preclusive rules.[110] For example, Judge Magruder had noted that a rigid adherence to res judicata may in fact spawn litigation—as when the Commissioner insisted that a taxpayer be bound by a prior judgment despite supervening legal developments which benefitted such taxpayers. Had the Commissioner admitted the insubstantial role to be accorded res judicata in tax cases, the taxpayer would never had been compelled to sue.[111] Cases recognizing the legitimacy of the forum's revulsion to enforcement of another sovereign's penalties also acknowledge the propriety of weighing competing interests against those of res judicata.[112]

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[106]320 U.S. 661 (1944).

[107]*Id.* at 670. The consideration of the countervailing federal interest which may supersede the state res judicata principles is not unlike that involved in certain problems of choice of law in diversity cases. *See, e.g.,* Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 356 U.S. 525 (1958); Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942).

[108]333 U.S. 591 (1947).

[109]*See, e.g.,* United States v. Stone & Downer Co., 274 U.S. 255 (1927).

[110]*See, e.g.,* Henricksen v. Seward, 135 F.2d 986 (9th Cir. 1943).

[111]Pelham Hall Co. v. Hassett, 147 F.2d 63 (1st Cir. 1945).

[112]*See, e.g.,* Milwaukee County v. M.E. White Co., 296 U.S. 268 (1935); Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888). Compare cases such as Anglo-American Provision Co. v. Davis Provision Co., 191 U.S. 373 (1903), in which New York's refusal to enforce an Illinois judgment, a refusal premised on the fact that New York law did not allow suits against foreign corporations, was upheld.

A recurring casebook selection, *Spilker v. Hankin*,[113] refused to estop a defendant from raising claims of overreaching in defense to actions upon a series of notes which she had executed in favor of plaintiff, a lawyer, as payment for legal services. The plaintiff had already sued successfully on one of the series of notes. Although recognizing that ordinarily she would be precluded from raising the defense, the court thought the special fiduciary position of the plaintiff and the unique interest which courts have in the propriety of such relationships amounted to sufficient countervailing conditions justifying abrogation of the normal res judicata bar. *Spilker*, then, more than many other cases refusing to accord full effect to prior adjudications, makes explicit the factor of injustice to a party, rather than a sovereign policy, as worthy of account in the calculus of successive related cases.

Despite *Spilker*, the strongest cases for exceptional treatment of prior litigation are those in which a distinct national policy can be discerned and articulated. Such a case is *Batiste v. Furnco Construction Corp.*[114] Seeking relief from alleged employment discrimination,[115] the plaintiffs had filed a complaint with the state commission empowered to remedy such wrongs. The state commission had awarded plaintiffs jobs and back pay. Defendant argued that because state law accorded full res judicata effect to the decisions of the state commission, the federal court, under the compulsion of section 1738, must do likewise.

The court acknowledged the usual force and command of section 1738, but found to be overriding "a strong Congressional policy that plaintiffs not be deprived of their right to resort to federal court for adjudication of their federal claims under Title VII."[116] This conclusion, however, was not based solely on the importance of the federal rights involved, nor upon a recognition that the post-Civil War civil rights acts, such as section 1981, skewed the federal balance, but rather upon the text of section 2000e-5(b) of title 42, in which recourse to the relevant state tribunal is called for, but final responsibility, according appropriate weight to the state findings, rested upon the federal courts. The court discerned a license to apply rules of preclusion cautiously and sparingly.

The unique federal interest, however, more often is discerned in the statutory treatment of jurisdiction. If Congress has prescribed the matter as being exclusively for the federal

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[113]188 F.2d 35 (D.C. Cir. 1951).

[114]503 F.2d 447 (7th Cir. 1974).

[115]The federal actions were premised on 42 U.S.C. §§ 1981 & 2000e (1970).

[116]503 F.2d at 450.

courts, the federal interest can be considered of unique weight—at least as compared with the policies of res judicata. The foremost of these cases is *Kalb v. Feuerstein*.[117] In *Kalb* a state judgment of foreclosure and a subsequent sale were held void because at the time of the judgment the possessor of the land had filed a petition in bankruptcy. The Supreme Court considered the congressional power over bankruptcy to be sufficient to oust a state court of jurisdiction over a petitioner's property and construed the pertinent provision of the Bankruptcy Act to place a farmer-debtor within the exclusive reach of the federal courts. Hence the state proceedings were entitled to no credit—they were, in fact, a nullity.

The force of res judicata was likewise dissipated when a lessee of Indian lands, sued for lease royalties, succeeded in establishing a counterclaim against the United States.[118] In a subsequent suit, the counterclaim was put forth as res judicata. The plea was rejected because the first court was without jurisdiction to hear claims against the United States.

Similarly, a recent action by the Government under the Economic Stabilization Act[119] raised the question of the Act's application to state employees.[120] State officials pled in bar a prior state court judgment. Aside from serious doubts as to the validity of the state judgment, it, in any case, had to give way before the national interest which called for exclusive federal court jurisdiction. Thus, when Congress has provided for exclusive federal court jurisdiction, state judgments are a nullity.

Of course, the great number of civil rights actions are not within the exclusive jurisdiction of the federal courts. State courts are fully competent to hear section 1983 actions, for example. Thus, the preceding discussion, while providing further illustration of the proposition that section 1738 is not inexorable when a unique national interest exists, is incomparable to the extent that Congress has never implied its disdain for related state adjudication by providing for exclusive federal jurisdiction. In fact, there are cases holding that when a plaintiff institutes a state

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[117]308 U.S. 433 (1940).

[118]United States v. United States Fidelity & Guar. Co., 309 U.S. 506 (1940).

[119]12 U.S.C.A. § 1904 note (Cum. Supp. 1976).

[120]United States v. Ohio, 487 F.2d 936 (Temporary Emer. Ct. App. 1973). The Government sought to enjoin the State of Ohio from violating Executive Order 11695, which arose out of the Economic Stabilization Act. The Order was revoked on June 18, 1974, by Executive Order 11750. *See also* Denver Bldg. & Constr. Trades Council v. NLRB, 186 F.2d 326 (D.C. Cir. 1950), *rev'd on other grounds*, 341 U.S. 675 (1951) (recognizing the importance of congressional intent in determining the impact of res judicata).

law action and then a federal action seeking recovery for the same conduct but upon a federal remedy exclusively for federal cognizance, the plaintiff will be bound by the state judgment. He will be deemed to have elected his remedy despite the fact that the federal claim could not have been brought in the state court and hence was not, strictly speaking, available. Thus the results of a state court action under state antitrust laws barred a later federal antitrust action.[121] If federal courts are willing to preclude a party for selecting a state court where the federal action was not available, surely they might be more willing to preclude a plaintiff who resorts to a state forum but fails to include an available federal action.

A separate, but related, problem involves the effect to be given to state court determinations of issues normally within exclusive federal reach but emerging in state law actions, most often as defenses. It is generally conceded that nothing prevents state courts from resolving the federal issue as it affects the case before it.[122] Thus a parallel to our present problem is present: What effect is to be given to the determination of these issues in subsequent federal litigation when the same issues re-emerge?

Judge Hand, in his well-known opinion in *Lyons v. Westinghouse Electric Corp.*,[123] concluded, despite precedent to the contrary,[124] that the resolution of the federal issue, although effective in the state suit, cannot be deemed binding in the later federal action. Thus, the resolution of the defense to a state action of raising the claim that plaintiffs had conspired illegally to restrain trade was held not binding in a subsequent federal antitrust action in which defendant sought damages.[125] The strong federal policies presumably implicit in the jurisdictional exclusivity and a need for uniformity impelled Judge Hand's conclusion.

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[121] Engelhardt v. Bell & Howell Co., 327 F.2d 30 (8th Cir. 1964). *Cf.* International Ry. of Cent. Am. v. United Fruit Co., 373 F.2d 408 (2d Cir.), *cert. denied*, 387 U.S. 921 (1967); RESTATEMENT (SECOND) OF JUDGMENTS § 61.1, comment *e* (Tent. Draft No. 1, 1973). *See also* Singer v. A. Hollander & Sons, 202 F.2d 55 (3d Cir. 1953); Connelly v. Balkwill, 174 F. Supp. 49 (N.D. Ohio 1959), *noted in* 69 YALE L.J. 606 (1960); Kaufman v. Schoenberg, 154 F. Supp. 64 (D. Del. 1954).

[122] *See, e.g.*, MacGregor v. Westinghouse Elec. & Mfg. Co., 329 U.S. 402 (1947); Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations*, 53 VA. L. REV. 1360 (1967).

[123] 222 F.2d 184 (2d Cir.), *cert. denied*, 345 U.S. 923 (1955).

[124] *See, e.g.*, United States v. Silliman, 167 F.2d 607 (3d Cir. 1948); Straus v. American Publishers' Ass'n, 201 F. 306 (2d Cir. 1912), *appeal dismissed*, 235 U.S. 716 (1914).

[125] RESTATEMENT (SECOND) OF JUDGMENTS § 68.1, comment *e* (Tent. Draft No. 1, 1973); RESTATEMENT OF JUDGMENTS § 71 (1942).

The foregoing examples illustrate that section 1738 is something less than an inexorable command; when substantial federal policies would be imperilled by a rigid application of the prior state court determination, the latter, although not itself void, will not be credited.

C. Habeas Corpus

Habeas corpus provides the most well-established exception to the usual binding effect of prior state court litigation. Furthermore, the writ is designed to remedy invasions of constitutional liberties, the same type of wrong at which federal civil rights acts are aimed. In fact, of course, the blending of function between habeas corpus and section 1983 actions has spawned much discussion, at the center of which is the case of *Preiser v. Rodriguez.*[126]

Preiser involved civil rights actions by prisoners seeking restoration of good time. Although the habeas corpus route was open, the advantage in the civil rights action was that no exhaustion of state remedies was required. The Supreme Court held that if habeas corpus was available and potentially efficacious, it was the proper remedy.[127] The entire Court, despite fundamental disagreement on the role of section 1983 vis-a-vis habeas corpus, agreed that "[p]rinciples of *res judicata* are, of course, not wholly applicable to habeas corpus proceedings."[128]

The justifications for such exceptional treatment have been examined elsewhere,[129] and many of them harmonize with a parallel easing of res judicata in section 1983 actions. For example, in *Fay v. Noia,*[130] Justice Brennan stated:

> [T]he familiar principle that *res judicata* is inapplicable in habeas proceedings . . . is really but an instance of the

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[126]411 U.S. 475 (1973).

[127]The Court recognized that damages were not available in habeas corpus. Therefore, if damages rather than custodial adjustments were the goal, section 1983 was presumably available as an alternative, or even supplemental, remedy.

In dissent, Justice Brennan, joined by Justices Douglas and Marshall, argued that the potential for simultaneously pursuing split remedies—habeas corpus for release and section 1983 for damages—would tend to magnify confusion and federal/state conflict, especially insofar as doubt remained about the res judicata effect of state court litigation in subsequent civil rights actions—a matter upon which the majority and dissenters disagreed. *Compare* 411 U.S. at 493-94, *with id.* at 509 n.14.

[128]*Id.* at 497.

[129]*E.g.*, Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1113 *et seq.* (1970).

[130]372 U.S. 391 (1963).

> larger principle that void judgments may be collaterally impeached.[131]

And at least since *Brown v. Allen,*[132] the "voidness" of which Justice Brennan spoke stems from a deprivation of constitutional rights, the same claim that is made in a federal civil rights action. Of course, there are differences between habeas corpus and civil rights actions; among them, the history of the Great Writ has always made it an exceptional proceeding, in part, at least, because of the serious burden—deprivation of liberty—under which the petitioner suffers.

The habeas procedure, expounded first by the Supreme Court[133] and then by Congress,[134] does not ignore wholly the state proceedings. It may be said that res judicata operates in habeas corpus, but in a severely diluted fashion. Briefly, the state finding is presumptively correct unless it is shown or it appears that the state proceedings were inadequate, insufficient, truncated, or otherwise not fully satisfactory. If such is the case, the federal court is to conduct its own factual hearing. Even if the state court proceedings appear adequate, the federal court may, in its discretion, conduct a fact hearing, although the petitioner's burden in such an instance is to establish error "by convincing evidence."[135]

The real significance of federal court factfinding, so honored in present habeas corpus procedure, has concerned the Court in other contexts as well, notably litigation involving a claim of deprivation of constitutional rights. The supportive references in such cases to the habeas mode are telling.[136] These comments arise in the context of abstention—formally a temporary and limited deferral by the federal to the state court system. While some recent signs suggest that the Court will encourage even greater diffidence by the federal courts in abstention cases,[137] presumably a federal plaintiff faced with abstention may still preserve a chance for a federal fact hearing by reserving the federal claims during his state court sojourn.[138] What is pre-

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[131] *Id.* at 423.

[132] 344 U.S. 443 (1953).

[133] Townsend v. Sain, 372 U.S. 293 (1963).

[134] 28 U.S.C. § 2254 (1970).

[135] *Id.* § 2254(d).

[136] England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 417 n.8 (1964).

[137] *See, e.g.*, Hicks v. Miranda, 422 U.S. 332, 349 (1975); Doran v. Salem Inn, Inc., 422 U.S 922 (1975).

[138] The federal plaintiff who seeks to enjoin state proceedings and cannot surmount the *Younger* hurdles, is, unlike the true abstention case plaintiff, hit with dismissal and with no promise of returning to federal court (except the Supreme Court on review).

served then, in abstention cases as well as habeas corpus cases, is a shot at the federal forum so long as that chance is not waived either by failing to reserve the federal question, or, in the habeas corpus context, by freely and voluntarily foregoing available state procedures capable of considering petitioner's constitutional claim.

D. A Special Res Judicata

The waiver technique has been applied by at least one court to the central problem presented in this Article: state litigation followed by a federal civil rights action. In *Lombard v. Board of Education,*[139] the Second Circuit Court of Appeals, impressed with the supplementary character of section 1983, searched the state proceedings leading to the plaintiff's discharge from employment as a public school teacher to determine if his failure to raise the constitutional issues constituted a waiver. While such an approach does not make clear how a state litigant wishing to get a federal fact hearing could do so without having waived his chance to present his constitutional claims, the case does illuminate the possibility of a sensitive look at the state proceedings rather than an inflexible application of res judicata without regard to the unique federal interests involved.

In other words, the strong federal interest may be respected by mitigating the effects of res judicata rather than by a total rejection of these doctrines, which do, after all, serve valid purposes. The notion of "special res judicata" when federal civil rights are at stake has been suggested by some federal courts,[140] as well as by commentators,[141] as an alternative to treating all state court judgments containing constitutional error as void, a proposition somewhat contrary to entrenched precedent.[142]

When one assays the dilemma of certain state court litigants, particularly state criminal defendants, there is more reason to embrace, at the least, a sensitivity toward application of principles of res judicata. Although many have noted the trend toward

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[139]502 F.2d 631 (2d Cir. 1974).

[140]*See, e.g.*, Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975). Pelham Hall Co. v. Hassett, 147 F.2d 63 (1st Cir. 1945), and Henricksen v. Seward, 135 F.2d 986 (9th Cir. 1943), are indicative of a special caution in some tax cases.

[141]*See, e.g.*, Averitt, *supra* note 88, at 208; McCormack, *supra* note 85. One commentator has suggested that the preclusionary principles of habeas corpus simply be resorted to in civil rights actions. Comment, *The Collateral Estoppel Effect of State Criminal Convictions in Section 1983 Actions*, 1975 U. ILL. L.F. 95.

[142]*See, e.g.*, Angel v. Bullington, 330 U.S. 183, 187 (1947). The exceptional nature of habeas corpus is thus highlighted.

a spreading of preclusionary rules,[143] there has been as well a willingness to compare the present and former trial environments to determine if the matters assertedly settled were in fact considered in any real or complete sense.[144] If the environments between the actions differ significantly, preclusionary rules may then be wielded with a more delicate touch.

The state defendant, particularly the state criminal defendant, is in a singularly sympathetic position. Faced with a tribunal not of his choosing and possibly not to his liking, he nevertheless must present his constitutional defenses, which are the stuff of his future civil rights action, or stand mute in the face of the state's case. Yet, having raised constitutional defenses, he will be bound by their resolution—if preclusion principles are applied in full—and thus be precluded from an effective federal hearing. The chances of removal or review in the Supreme Court are little consolation. Even habeas corpus, while available to an unsuccessful criminal defendant, will not provide any kind of reparation.[145] What, furthermore, of the state civil defendant who has not constitutional defenses, but a counterclaim of constitutional stature and of a compulsory nature? Presumably, he is forced to litigate in the state forum without any hope of removal. Similarly, abstention doctrines and the cases in the *Younger* line have taught some potential plaintiffs the futility of initial recourse to federal courts.

It has been thought that a state litigant, even a state plaintiff who could not obtain relief in the federal courts because of abstention or the reluctant equity prescribed by *Younger,* ought not to be precluded from later recourse to the federal court. At least one federal court has commented that requiring initial resort to federal court only to face abstention, causing a trek to the state court where, if practical, the federal question is reserved, followed, finally, by a return to the federal court, is a ludicrous price, even if squandered in the interests of a balanced federalism.[146] At the very least, it has been suggested, such a federal plaintiff should be entitled after his state court journey to a consideration of whether, had he initially resorted to the

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[143]*E.g.,* Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts,* 66 MICH. L. REV. 1723, 1741-42 (1968).

[144]*See* RESTATEMENT (SECOND) OF JUDGMENTS § 68.1 (Tent. Draft No. 1, 1973).

[145]A curious question arises as to a criminal defendant who successfully petitions for habeas corpus and then seeks compensation in a section 1983 action. Will the state proceedings or the habeas proceedings determine issues which re-emerge?

[146]Lombard v. Board of Educ., 502 F.2d 631 (2d Cir. 1974).

federal court, he would have been rebuffed. If so, a lesser penalty, or none, ought to be attached to the results in the state forum.

An additional, although not so severe, dilemma is presented by the state plaintiff who fails to join a related federal cause because the latter is within the exclusive jurisdiction of the federal courts. Upon institution of the federal action, he is likely to be rebuffed.[147] It is this unwilling state litigant who has received the sympathy of commentators.[148] Thus, it has been suggested that, at the least, if the federal plaintiff has not chosen the state forum, but has by the very exigencies of the case or by procedural rules been forced to litigate aspects or all of his civil rights claim in a state court, traditional preclusion principles should not apply.

Thistlethwaite v. City of New York[149] affords an illustration of the central dilemma of the party forced to litigate in the state forum. Appellants had been convicted for distributing pamphlets in Central Park without permits. Their quest for a dismissal on the basis of the ordinance's invalidity was unsuccessful. Further review in the state court system was unavailing. Appellants did not seek Supreme Court review but filed a section 1983 action in the federal district court seeking declaratory and injunctive relief on the basis that the ordinance requiring a permit was facially unconstitutional and, when read in conjunction with the permit-dispensing provisions of related ordinances, was unconstitutional as applied. The Second Circuit Court of Appeals, over Judge Oakes' dissent, held that the appellants were precluded by the state proceedings from attacking the constitutionality of the ordinance under which they were convicted.[150]

The existence of the 1983 claim, underlying which are values of unique federal import, prompted Judge Oakes, but not the majority, to take a more restrictive view of res judicata than might be appropriate in other cases. Judge Oakes' more intricate examination of the state proceedings noted the following problems. The attack in the state courts was upon the face of the

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[147]*See* Kaufman v. Schoenberg, 154 F. Supp. 64 (D. Del. 1954).

[148]*See, e.g.*, Averitt, *supra* note 88; Vestal, *State Court Judgment as Preclusive in Section 1983 Litigation in a Federal Court*, 27 OKLA. L. REV. 185 (1974); Comment, *supra* note 141; 88 HARV. L. REV. 453 (1974).

[149]497 F.2d 339 (2d Cir. 1974), *cert. denied*, 419 U.S. 1093 (1974), *noted in* 59 MINN. L. REV. 623 (1975), *and* 1974 WIS. L. REV. 1180.

[150]Although the court held that appellants were precluded whether or not their litigation in state court was voluntary, the opinion suggests that the appellants' having insisted on forging ahead despite the prosecutor's willingness to forget the matter could be accounted as a choice to litigate in the state forum. The court also opined that habeas corpus was probably available to appellants—a view subject to some doubt.

ordinance, while the federal suit attacked the ordinance as applied and as part of the entire permit-dispensing system. The other ordinance added, at least as characterized by plaintiffs, additional infirmities. Furthermore, the federal suit properly could be characterized, at least in part, as seeking prospective relief in regard to future pamphleteering.

Of course, cases arise in which the state issue, for example, illegal search or seizure decided upon a motion to suppress, is more clearly identical with the federal quest: for example, a suit for damages for violation of the plaintiff's fourth amendment rights.[151] In such a case, the res judicata question is purer: Ought civil rights actions be exceptions to section 1738, at least where the federal plaintiff was an involuntary state litigant?

As the exceptional treatment of res judicata in habeas corpus proceedings has been pinioned on specific defects in the state proceedings, so, if the special nature of civil rights actions are to prompt a milder preclusion, certain factors in the state proceedings may be defined as appropriate considerations in determining the effect as res judicata to be given the prior judgment. As has been described above, the posture of the federal plaintiff in state court seems pertinent; that is, the extent to which the state forum was chosen by the federal plaintiff ought to be considered. In addition, Professor McCormack has suggested the following elements as sufficient to dilute the usual preclusive effect commanded by section 1738: (1) a state court or agency had an institutional interest in the state decision; (2) the constitutional claim relates to the manner of state decision rather than aspects of the substantive dispute; (3) the issue at stake involves a question of the relationship between the individual and the state; (4) as in habeas corpus, the fact-finding process in the state forum was inadequate, presenting a special need for federal factfinding.[152] In such circumstances, not only is the weighty interest represented by the constitutional dimensions of the claim tugging against preclusion, but certain of the values promoted by res judicata are of lesser moment than usual: for example, the relatively greater resources of the state as litigant considerably reduce the fear of harassment.

In *Brown v. Chastain*,[153] the parties had been divorced, custody of the child having been awarded to the mother. This custody decision was upset five years later at the father's behest. The mother, seeking to appeal her loss of custody but finding herself unable to afford a necessary transcript, petitioned the state courts that a

[151] *See, e.g.*, Moran v. Mitchell, 354 F. Supp. 86 (E.D. Va. 1973).

[152] McCormack, *supra* note 85, at 276.

[153] 416 F.2d 1012 (5th Cir. 1969).

transcript be provided. Her petition, and an appeal therefrom having been denied, she claimed in a federal civil rights action that she had been denied equal protection. The Fifth Circuit Court of Appeals held her barred from relief, characterizing her quest in the federal district court as essentially a quest for review of a state court judgment, a power not granted to the lower federal courts.[154]

Judge Rives dissented. He explained that plaintiff really was not seeking relief from a final order and it was doubtful whether the order was of such a sort as to permit review in the Supreme Court.[155] The issue was collateral to the main state proceedings, and, as it involved custody, seemed to Judge Rives to parallel habeas corpus even more closely than the usual section 1983 action.

Whether Judge Rives' analysis is correct or not, his willingness to analyze the propriety of applying a bar illustrates the type of analysis in which one convinced of the special nature of civil rights actions might engage. Other courts and judges similarly inspired have, at a minimum, sparingly applied preclusion principles, demanding, for example, strict mutuality and co-identity between issues.[156]

On the other hand, a sensitive analysis of the state proceedings may reveal that, despite the civil rights nature of the action, application of the bar is quite appropriate. In *Mastracchio v. Ricci*,[157] the plaintiff, having been convicted of murder, brought a section 1983 action against certain police officers, contending that their perjury had convicted him. The circuit court felt the perjury issue must be deemed to have been encompassed in the affirmance of plaintiff's conviction unless the perjured testimony was not essential to the conviction, in which case the plaintiff could not show damages. In closing dictum, however, the court distinguished the case from one in which the civil rights suit raised a deprivation peripheral to the conviction, for example, invasions of privacy. The court hinted that in the latter instance, it would be less willing to regard such issues as subsumed by a guilty plea or conviction, even though technically they would be. So, too, in *Engelhardt v. Bell & Howell Co.*,[158] close analysis of the prior ac-

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[154] *Id.*

[155] *Id.* at 1018-19 (Rives, J., dissenting).

[156] *See, e.g.*, G & M, Inc. v. Newbern, 488 F.2d 742 (9th Cir. 1973); Tang v. Appellate Div., 487 F.2d 138, 143 (2d Cir. 1973) (Oakes, J., dissenting), *cert. denied*, 416 U.S. 906 (1974); Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963); Olson v. Board of Educ., 250 F. Supp. 1000 (E.D.N.Y. 1966); Illinois Cent. R.R. v. Mississippi Pub. Serv. Comm'n, 135 F. Supp. 304 (S.D. Miss. 1955).

[157] 498 F.2d 1257 (1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975).

[158] 327 F.2d 30 (8th Cir. 1964).

tions revealed a plaintiff who had instituted three previous state court actions based upon violation of state antitrust laws, each action having been removed to the federal court, where plaintiff failed to amend to raise the related federal claims which he now, in a fourth and federal action, contended should not be barred. Such a plaintiff hardly attracted the court's sympathy.[159]

E. A Note on Full Faith and Credit

As noted above, there was a time when argument was made to the Supreme Court that full faith and credit requires only that judgments of sister states operate as evidence. The contention was rejected.[160] Ever since, it has been assumed that judgments must be given the same effect as they would be entitled to in the forum where rendered. This brocard has been considered as requiring the second forum not only to bar an attempt to relitigate the same claim, but also to accord binding effect to litigated components of the first judgment in subsequent, but different, suits. Thus if issue *A* is resolved in the first case, and the same issue re-emerges in a second case, a case different both in content and forum, it has generally been thought that the second forum is bound by the first forum's resolution of *A*. This is so by operation of the principles commonly called collateral estoppel.

While the rule that courts in a federation honor each other's judgments seems essential, a requirement that each fact determination made by one tribunal be honored by another seems less compelling—at least when the fact arises in a different context. The first requirement is a necessary binding—that the sovereign's final resolution of a dispute be respected; the second, while perhaps promoting the principles underlying res judicata—cessation of harassment and judicial economy—hardly seems to implicate the profounder values of union underlying full faith and credit.

The distinction to be made is between a case deciding the rights of parties, and an intermediate and somewhat conditional determination of a contested issue. The difference is to some extent illustrated by cases in which state courts have decided issues normally arising in cases of exclusive federal cognizance. For example, in *Becher v. Contoure Laboratories, Inc.*,[161] the plaintiff, seeking to enjoin a state court action, contended that certain issues arising in the state court were typical components of a

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[159]*See id. See also* Singer v. A. Hollander & Sons, 202 F.2d 55 (3d Cir. 1953); Kaufman v. Schoenberg, 154 F. Supp. 64 (D. Del. 1954).

[160]Mills v. Duryee, 11 U.S. (7 Cranch) 302 (1813).

[161]279 U.S. 388 (1929).

patent infringement action, a matter solely for the federal courts, and, therefore, ousted the state courts of competence. The Court rejected this contention:

> That decrees validating or invalidating patents belong to Courts of the United States does not give sacrosanctity to facts that may be conclusive upon the question in issue.[162]

That is, while patent cases are for the federal courts, aspects of patent cases may arise in and be decided by state courts. Moreover, if Judge Hand was right, the resolution of those federal issues, while binding for the limited purposes of the state case, should not bind the federal courts should the cause of action within exclusive federal jurisdiction present the same issues.[163]

Cases such as *Becher* suggest a distinction between the "case," a peculiar combination or complex of issues, and the individual issues which may arise in a variety of contexts, a distinction paralleling that between a judgment and intermediate resolution of component facts. This parallelism suggests that while full faith and credit may demand a fairly strict observance of bar and merger, these demands dissipate where the preclusionary rule affects only issues, not claims—that is, what is commonly called collateral estoppel.

Distinguishing between a judgment and its component issues is especially significant when it is recognized that the federal civil rights plaintiff most frequently in a sympathetic position is the one whose state court involvement was involuntary—usually as a defendant, and, hence who will be precluded, if at all, by collateral estoppel, not bar or merger principles.

In its general application, full faith and credit is not a monolith. There is room for consideration of competing interests—of the forums and the parties. This seems especially true when the choice of law devolves upon the common law rather than the statutory law of the first forum.[164] This point is underscored by *Williams v. North Carolina,*[165] a case in which the Supreme Court permitted North Carolina to re-examine the question whether a

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[162]*Id.* at 391. *See also* Pratt v. Paris Gas & Coke Co., 168 U.S. 255 (1897).

[163]Lyons v. Westinghouse Elec. Corp., 222 F.2d 184, 188-89 (2d Cir.), (Hand, J.), *cert. denied,* 350 U.S. 825 (1955). *Restatement of Judgments* section 71 agrees with the *Lyons* case.

[164]*See generally* Milwaukee County v. M.E. White Co., 296 U.S. 268 (1935); Hood v. McGehee, 237 U.S. 611 (1915); Clarke v. Clarke, 178 U.S. 186 (1900); Leflar, *Constitutional Limits on Free Choice of Law,* 28 LAW & CONTEMP. PROB. 706 (1963); Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law,* 44 IOWA L. REV. 449 (1959).

[165]325 U.S. 226 (1945).

defendant charged with bigamy had established domicile for divorce in Nevada despite the Nevada decree's finding of domicile. While in earlier related litigation,[166] the Court had held North Carolina bound to honor the Nevada decree, assuming the Nevada domicile, *Williams II*, recognizing significant North Carolina interests, and the fact that the state had not been a party to the Nevada divorce action, permitted the state to satisfy itself as to domicile. Again, we see implicit a distinction between the case and its components.

The recognition of the second forum's interest as overriding res judicata is not unlike that present in diversity cases, where a choice of law—state or federal—has to be made. If the federal interest is high, the federal rule will control.[167] In such cases, as well as in normal conflict of laws problems, a dichotomy, perhaps more conclusory than resolutionary, between procedural and substantive law is often recognized, the forum having greater leeway to apply its own procedural rules. Matters concerning the conduct of litigation, for example, are properly, if only roughly, called procedural. Collateral estoppel operates more nearly as a rule of evidence—precluding proof on an issue as having been already resolved. Unlike its interest if its judgments are to be disregarded, a state's interest in later issue estoppel is surely of lesser dimension. So long as a state's judgment is respected and entitled to enforcement, it is difficult to see why a state's claim to infallibility on each particular issue merits honor.[168]

Thus, it appears that when issue and not claim preclusion is concerned, significantly different matters are at stake. The special federal interest in civil rights has been assumed. Playing against this is a state interest of somewhat lesser moment than is present when its judgments are threatened with dishonor. The extent of issue estoppel ought to be treated as is any other choice of law question.[169] Doing so will neither upset important values underlying full faith and credit nor cause undue affront to the state's interest.

IV. Conclusion

This Article was not designed to resolve the fundamental question as to whether civil rights actions should be exceptions

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[166]Williams v. North Carolina, 317 U.S. 287 (1942).

[167]*See, e.g.*, Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 356 U.S. 525 (1958); Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942).

[168]See Carrington, *Collateral Estoppel and Foreign Judgments*, 24 Ohio St. L.J. 381 (1963), for a similar contention, more fully explored.

[169]A similar suggestion is made in Note, *Collateral Estoppel in Multistate Litigation*, 68 Colum. L. Rev. 1590 (1968).

to the requirements of res judicata as implemented by statutory full faith and credit. Rather, it is intended to portray inconsistency in the federal courts, to highlight the federal civil rights litigant's dilemma stemming from prior state litigation, and to call for some resolution of this pressing problem. The refusal of the Supreme Court to resolve the issue has bred a double inconsistency in lower courts: first, in the willingness or not to suspend normal res judicata principles in federal civil rights actions; second, in the failure of so many courts to acknowledge the critical role of full faith and credit as implemented by section 1738.

Of course, the mere recognition of the central role of full faith and credit does not determine the exact dimensions of res judicata in the second federal action. For it is clear that there are many situations in which competing interests have been deemed momentous enough to overcome the values promoted by preclusionary rules. There is, thus, ample precedent for creating exceptions to section 1738—whether the exception is to take the form of complete disregard of state adjudication, as is the case in matters of exclusive federal jurisdiction, components of which may turn up in a state forum, or the form of a softer res judicata, an extreme example of which is presented by habeas corpus.

Habeas corpus, of course, presents an attractive and apt analogy to civil rights actions. In habeas proceedings the values promoted by preclusionary principles have been frankly subordinated to the constitutional values at stake. Yet the Supreme Court's insistence on maintaining a distinction between habeas corpus and section 1983 actions suggests that the extreme, though not total, disregard of state litigation fashioned for habeas proceedings may not be acceptable in civil rights actions. Nevertheless, the special nature of the rights involved could call forth a special examination of the state litigation to ascertain the extent to which the federal plaintiff was forced into a tribunal not of his choosing and the extent to which that tribunal can be considered an adequate substitute for the federal forum he now seeks. The adequacy would depend not only on the state forum's competence, which is normally to be assumed, but the extent of state interest riding against plaintiff and the extent to which the environment in the state case was conducive to and inducive of a full-scale consideration of the federal claim. Upon such factors as these, the federal judge might fashion a custom-crafted set of preclusionary rules which account for the unique federal civil rights interest.

The special nature of federal civil rights actions and the special role of the federal courts in enforcement has been recognized and cannot be gainsaid. Therefore, at the least, a specially

flexible and sensitive application of res judicata may be called for —an application which examines closely the environment in the state court to make certain that the special federal interest is not ignored or given inadequate attention.

As it turns out, those situations in which the federal plaintiff is most apt to appear in a sympathetic light are those in which he appeared involuntarily in the state forum. In such a circumstance, the preclusionary principle apt to despoil the civil rights claim is one of collateral estoppel, not bar or merger. Neither the state's interest nor that of the federal union are affronted by granting less than preclusive effect to an intermediate fact determination. Such disregard has hardly the insult attached to simply disregarding a judgment of a state.

What have been portrayed, then, are a variety of circumstances in which related state litigation raises questions of res judicata in not at all abnormal federal civil rights actions. The federal plaintiff's need for guidance, if not sympathy, may vary with his posture in the state courts, but is potentially a problem whether he was a state plaintiff or defendant. Additional uncertainty stems from the increasingly subtle rules of abstention and federal equity.

Whatever may be the appropriate resolution of the issue, it ought to be resolved. This is particularly so as it concerns federal/state relationships of a sort in which the Supreme Court has recently claimed to have a special interest. Moreover, the Court's own recent contributions to abstention and federal equitable principles have made the question of the effect of state litigation even more pressing.

Comment

Impeachment Revisited

DAVID W. DENNIS*

I. INTRODUCTION

The story goes that at the end of the Battle of the Boyne, one of James II's Irish troopers pulled up his horse momentarily before he left the field and shouted to King William III's advancing and victorious soldiers, "Trade kings, and we'll fight you again!" In somewhat like manner, I heard one of President Nixon's counsel say, after the revelation of the fatal Nixon-Haldeman tape of June 23, 1972,[1] "Damn it, we could have won this case."

As a lawyer, and as one of the ten members of the House Committee on the Judiciary who voted "No" to all three Articles of Impeachment,[2] I sympathize with both the unknown Irishman and the frustrated counsel. I understand how they felt, and in the case of the counsel, I shared his feeling. As did the Stuart kings, Mr. Nixon had better men fighting for him than he deserved.

In neither case, however, was the fight really made for an individual. The supporters of the Stuarts fought for royalty, religion, and the structure of British society as they believed it ought to be. Likewise, those of us on the Judiciary Committee who voted "No" to the Articles of Impeachment were not concerned primarily with the defense of Mr. Nixon as an individual; we stood, rather, for due process of law, as we understood it, under the facts and the evidence as they were known to us and existed at the time we were called upon to cast our votes.

II. THE LAW

Article II, section 4 of the United States Constitution provides:

> The President, Vice President and all civil Officers of

*Member of Congress from Indiana, 1969-75; Member of the House Committee on the Judiciary, 1969-75.

[1] In this tape, the President implicated himself in interfering with the Watergate investigation for political reasons. See N.Y. Times, Aug. 6, 1974, at 14-15, for the text of the Nixon-Haldeman tape of June 23, 1972, and *id.* at 1, col. 4-7, for the text of the President's statement accompanying the release of this tape.

[2] See pp. 582-84 *infra*.

> the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

It is an old debate, under this provision, whether "other high Crimes and Misdemeanors" must be violations of the criminal law, as, of course, are treason and bribery.

Harvard Professor Raoul Berger argues persuasively in his scholarly work *Impeachment: The Constitutional Problems*[3] that these "other high Crimes and Misdemeanors" need not be violations of the criminal law.[4] "High Crimes and Misdemeanors," he contends, were, and are, words of art, stemming from English parliamentary law and practice, rather than from English common law[5] and encompassed many acts—such as giving the King bad advice or mishandling the tactics of the Royal Fleet—which were in no sense ordinary crimes.[6]

Nevertheless, the fact remains that impeachment, in the English practice, was an essentially political matter—an integral part of the constitutional struggle between the Parliament and the Crown. When the Framers came to write our Constitution, that struggle had been largely concluded. Treason was carefully and most narrowly defined in our written Constitution, and our constitutional provisions regarding impeachment were couched, for the most part, in the language of the criminal law. Thus, the United States Constitution provides:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be *convicted* without the concurrence of two thirds of the Members present.[7]
>
> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party *convicted* shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.[8]

I do not regard the clause providing that "the Party convicted shall nevertheless be liable and subject to Indictment, Trial,

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[3]R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973).

[4]*Id.* at 53-102.

[5]*Id.* at 62.

[6]*Id.* at 71.

[7]U.S. CONST. art. I, § 3, cl. 6 (emphasis added).

[8]U.S. CONST. art. I, § 3, cl. 7 (emphasis added).

Judgment and Punishment, according to Law" as necessarily an argument against the criminal nature of impeachment, as Professor Berger urges.[9] It seems at least equally logical to argue that, in the case of this one unique offense, with removal from office as its only constitutionally provided punishment, the Framers simply decided that the defense of a previous conviction should not be available in any future prosecution in the regular criminal courts. This latter interpretation is supported by several provisions of the Constitution.

Under article II, the President has the "Power to grant *Reprieves* and *Pardons* for *Offenses* against the United States, *except in Cases of Impeachment.*"[10] Article III provides that "[t]he Trial of all *Crimes,* except in Cases of *Impeachment,* shall be by Jury . . . ."[11] Finally, of course, the basic impeachment provision speaks of "Treason, Bribery, or **other** *high Crimes* and Misdemeanors."[12]

It is a fact, too, as shown by the debates in the Constitutional Convention, that the phrase "other high Crimes and Misdemeanors" was substituted for George Mason's suggestion of "Maladministration" upon the objection of James Madison that "[s]o vague a term will be equivalent to a tenure during [the] pleasure of the Senate."[13] Colonel Mason, who thus withdrew "Maladministration" and substituted the phrase "other high Crimes and Misdemeanors," had himself stated earlier in the debate that "[w]hen great *crimes* were committed, he was for punishing the principal . . . ."[14]

History has also recorded the successful assertion of the interpretation of impeachment as having a criminal nature. Luther Martin, a distinguished member of the bar and a delegate to the Constitutional Convention, successfully defended Justice Samuel Chase at his impeachment trial by making the argument that his client had not committed any crime.[15] William M. Evarts, and other distinguished counsel for President Andrew Johnson, made this same argument in the impeachment trial of their presidential client.[16]

The minority report of the House Committee on the Judiciary, in the first and unsuccessful effort to impeach President Andrew

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[9]R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 79 (1973).

[10]U.S. CONST. art. II, § 2, cl. 1 (emphasis added).

[11]U.S. CONST. art. III, § 2, cl. 3 (emphasis added).

[12]U.S. CONST. art. II, § 4 (emphasis added).

[13]2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 500 (1911).

[14]*Id.* at 65 (emphasis added).

[15]*See* 14 ANNALS OF CONG. 357, 432 (1805).

[16]*See* II TRIAL OF ANDREW JOHNSON 285-89 (1868).

Johnson, earlier made the same general point, concluding that while Johnson was certainly to be strongly censured from a political point of view, he had committed no crime and hence was guilty of no impeachable offense.[17] On that occasion the House, by its vote, apparently approved this argument,[18] although President Johnson's subsequent defiance of the Tenure-of-Office Act and his general course of conduct later led to his impeachment by the House,[19] and brought him within one vote of conviction.[20]

It is possible, perhaps, to imagine some serious neglect or dereliction of presidential duty which, while not technically criminal, might nevertheless rise to the level of an impeachable offense; however, it seems probable that such cases would be extremely rare. In practice, almost any conduct which could be considered serious enough to be impeachable would also be found to be criminal. This certainly was true, in my judgment, in the case of President Nixon. Perhaps as good and as sensible a statement on the subject as I have seen is that of Yale Law School Professor Charles L. Black, Jr.

> I think we can say that "high Crimes and Misdemeanors," in the constitutional sense, ought to be held to be those offenses which are rather obviously wrong, whether or not "criminal," and which so seriously threaten the order of political society as to make pestilent and dangerous the continuance in power of their perpetrator. The fact that such an act is also criminal helps, even if it is not essential, because a general societal view of wrongness, and sometimes of seriousness, is, in such a case, publicly and authoritatively recorded.
>
> The phrase "high Crimes and Misdemeanors" carries another connotation—that of *distinctness of offense.* It seems that a charge of high crime or high misdemeanor ought to be a charge of definite act or acts, each of which in itself satisfies the above requirements. General lowness and shabbiness ought not to be enough. The people take some chances when they elect a man to the presidency, and I think this is one of them.[21]

The entire impeachment proceeding, as I see it personally, is, at the least, quasi-criminal in character. It follows that proof—

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[17]*See* H.R. REP. No. 7, 40th Cong., 1st Sess. 105 (1867).

[18]*See* CONG. GLOBE, 40th Cong., 2d Sess. 68 (1867) (rejecting the Judiciary Committee's majority report which recommended impeachment).

[19]*See id.* at 1400.

[20]*See* II TRIAL OF ANDREW JOHNSON 496-97 (1868).

[21]C. BLACK, IMPEACHMENT: A HANDBOOK 39-40 (1974) (emphasis in original).

which leads to the forced removal of an official popularly elected to a fixed term of office—must be, at a minimum, of a clear and convincing character, falling but little short, if short at all, of proof beyond a reasonable doubt.

When we depart from these rigorous standards we run grave danger of purely political impeachment: of tenure, in Madison's words, "during [the] pleasure of the Senate,"[22] or, I might add, during the pleasure of a temporary congressional majority. No member of the House of Representatives can rightly salve his conscience by the constitutional sophistry that he merely brings the charge on a basis of some alleged "probable cause," while it is the Senators alone who must decide the facts. The House, it must be remembered, is not merely the accuser; the House goes to the bar of the Senate, and managers appointed by the House for that purpose prosecute the case.

As Representative James F. Wilson, Chairman of the House Judiciary Committee and later one of the House managers at the time of the Johnson impeachment, said in House debate on the first Johnson impeachment resolution:

> If we cannot arraign the President for a specific crime, for what are we to proceed against him? . . . If we cannot state upon paper a specific crime how are we to carry this case to the Senate for trial?[23]

The House, as Sam Garrison, our minority counsel, said, is therefore in the position of a "prudent prosecutor," and no member of the House should vote to impeach unless he believes the respondent to be guilty as charged, and believes further, that the case can be established and won by the production of competent and convincing evidence in a trial before the Senate, at which the Chief Justice of the United States will preside.[24]

III. The Articles of Impeachment and the Evidence

The Judiciary Committee, after many weeks of hearings, voted three Articles of Impeachment against Richard Nixon.[25]

Article I charged that:

> Richard M. Nixon, in violation of his constitutional oath faithfully to execute the office of President of the United

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[22]2 M. Farrand, The Records of the Federal Convention of 1787, at 550 (1911).

[23]Cong. Globe, 40th Cong., 2d Sess., app. 65 (1867).

[24]U.S. Const. art. 1, § 3, cl. 6.

[25]The Committee labored pursuant to H.R. Res. 803, 93d Cong., 2d Sess. (1974), which authorized the Judiciary Committee to investigate whether sufficient grounds existed for the House to impeach President Nixon.

> States . . . and in violation of his constitutional duty to take care that the laws be faithfully executed, has prevented, obstructed, and impeded the administration of justice, in that:
>
> On June 17, 1972, and prior thereto, agents of the Committee for the Re-election of the President committed unlawful entry of the headquarters of the Democratic National Committee in Washington, District of Columbia, for the purpose of securing political intelligence. Subsequent thereto, Richard M. Nixon, using the powers of his high office, engaged personally and through his subordinates and agents, in a course of conduct or plan designed to delay, impede, and obstruct the investigation of such unlawful entry; to cover up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities . . . .[26]

The Article then proceeded to specify the various means allegedly used "to implement this course of conduct or plan."[27]

Article II was a catch-all article, which we usually referred to as the "abuse of power" article. It set forth five separate and completely unrelated specifications of alleged official misconduct: political abuse of the Internal Revenue Service; allegedly illegal electronic surveillance; establishment of the so-called "plumbers" unit; failure to act to prevent various alleged illegal activities of his subordinates; and, once again, interference with the Federal Bureau of Investigation, the Special Prosecutor, and the Central Intelligence Agency.[28]

Article III charged that the President "failed without lawful cause or excuse to produce papers and things as directed by duly authorized subpoenas issued by the Committee on the Judiciary . . . and willfully disobeyed such subpoenas."[29] I spoke to this Article in debate in the Judiciary Committee as follows in part:

> [T]he President simply asserted what he stoutly claimed to be a constitutional right, and which he is, in fact, still legally free to assert to be a constitutional right so far as this committee is concerned, and we, on the contrary asserted a constitutional right in opposition to the Presidential claim. Such a conflict is properly one for resolution by the courts, and absent a binding and definitive decision between the parties by the judicial branch, it

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[26]H.R. REP. No. 1305, 93 Cong., 2d Sess. 1-2 (1974).

[27]*Id.*

[28]*Id.* at 3-4.

[29]*Id.* at 4.

> escapes me on what grounds it can properly be asserted that a claim of constitutional right is in any sense an abuse of power.[30]

I see no reason whatever to change that stated position. During the debate, I pointed out that the Special Prosecutor, unlike the Judiciary Committee, had gone to court and had in fact obtained an order for additional tapes and documents.[31] I suggested that these would no doubt become available to our Committee and might well result "in the furnishing to the committee of additional . . . highly material evidence which we do not have."[32] I proposed, without success, that we defer our vote pending production of this evidence.[33] Ten days later, the tape of June 23, 1972, evidence which made all the difference, was indeed produced.[34]

Article II was an example of absolutely horrible pleading in which five separate, distinct, and wholly unrelated acts of alleged misconduct were lumped together, instead of being charged as five separate articles, as they clearly should have been. This pleading monstrosity was fair neither to the President nor to the members of the Congress who would have been called upon to vote upon it. Individual members might well have taken different views of the separate acts alleged within the Article. Moreover, as I pointed out in the Committee debate, the proof in support of the matters charged in this Article was legally and factually weak and insufficient.

> [F]irst illegal surveillance. . . . [T]he 17 wiretaps which are chiefly complained of under this heading were all instituted before the *Keith* decision,[35] and were not only presumptively legal at that time, but are probably legal in large part today, since many if not all of them had international aspects, a situation in which the need for a court order was specifically not passed upon in the *Keith* decision.
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> Second, use of the executive power to *unlawfully* establish a special investigating unit to engage in unlawful covert activities. But, it was *not* unlawful so far as I am advised to establish the plumbers unit, and I suggest

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[30]*Debate on Articles of Impeachment, Hearings on H.R. Res. 803 Before the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 41 (1974).

[31]*Id.* at 40.

[32]*Id.* at 41.

[33]*Id.*

[34]See note 1 *supra*.

[35]United States v. United States Dist. Court, 407 U.S. 297 (1972) (author's footnote).

> that proof is lacking that the President intended for it to engage in *unlawful,* covert activities.
>
> . . . .
>
> Third, alleged abuse of the IRS. Without going into detail, I suggest that the evidence here so far as the President is concerned is one of talk only and not of action, . . . and that the only direct evidence of an alleged Presidential order in the *Wallace* case[36] is a hearsay statement by Clark Mollenhoff that Mr. Haldeman *said* to him that the President requested him to obtain a report which, of course, is not competent proof of anything.[37]

All of these variegated matters were debatable, both on the law and on the facts. Regarding the alleged illegal surveillance, for example, a foreign connnection sufficient to permit wiretaps may not have been adequately established; yet, it is at least true that the law regarding the requirement of a court order, even for purely domestic national security wiretaps, was unsettled at the time of the acts complained of. Moreover, President Nixon followed the practice of several of his predecessors in this field. Some of my colleagues felt that presidential participation in attempted political abuse of the IRS was more clearly made out than did I. And so it went—there was something for everyone somewhere in the catch-all charges of Article II. All in all, however, I can only conclude that those responsible for this conglomerate article had hoped that the whole would impress its readers as being greater than the sum of its parts.

Article I, of course, alleged an impeachable offense, and did so in reasonably clear and intelligible language. The problem here was the problem of proof. At the time our Committee voted on this Article, I was of the opinion that the requisite degree of proof was lacking, under the standards previously discussed, and that the case against the President had not been made out. It remains my judgment, based on the state of the proof at that time, that this opinion was correct.

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[36][Author's footnote]. *See Statement of Information, Hearings on H.R. Res. 830 Before the House Comm. on the Judiciary,* 93d Cong., 2d Sess., bk. VIII, at 38-39 (Clark Mollenhoff affidavit, June 4, 1974, regarding IRS investigation of political contributions of Gerald Wallace, brother of Governor George Wallace).

[37]*Debate on Articles of Impeachment, Hearings on H.R. Res. 803 Before the House Comm. on the Judiciary,* 93d Cong., 2d Sess. 41 (1974) (emphasis added).

I was aware that many suspicious circumstances had been established.[38] I realized that it was possible that the President might be guilty of obstructing justice. Thus, I would have been willing, at that point, to vote for a resolution of censure on the basis of the record in general and on the fact that the tapes which had been made available, even standing by themselves, demonstrated a personal and political amorality on the part of a President of the United States which was truly shocking.

I did *not* believe, however, that personal knowledge of, or participation in, any impeachable offense had been brought home to the President by competent proof at that time, and I was determined to give him the benefit of the reasonable doubt—as I would have done in the case of any President, or of any other American.

Impeachment, of course, is in part a political process. President Ford, as a member of the House supporting an impeachment resolution against Justice William O. Douglas, said that an impeachable offense was, in effect, anything that a majority of the Congress might decide it to be.[39] This, in my judgment, can be true only in fact, and not in morals or at law.

I have spent a rather substantial portion of my life in courts of law defending the presumption of innocence on behalf of a number of rather obscure American citizens. To my mind, President Nixon was entitled to no more—but certainly to nothing less—than was extended to these less well-known Americans, and this view was, if anything, strengthened by the fact that his immediate jury, the Judiciary Committee, included several members who had themselves introduced impeachment resolutions—an act of personal involvement which would have disqualified them from sitting in judgment in any normal legal proceeding.

At the time of the Judiciary Committee vote, the most damaging evidence directly touching President Nixon was that concerning the payment of $75,000 of alleged "hush money" to E. Howard Hunt on the night of March 21, 1973. I discussed that incident in the Committee debate, and then said:

> [T]he March 21 payment to Hunt was the last in a long series of such payments engineered by Mitchell, Haldeman, Dean and Kalmbach, and later on LaRue, and all so far as appears without the President's knowledge

[38]The circumstance which had the greatest impact on my opinion at that time was the $75,000 payment to E. Howard Hunt on March 21, 1973. *See Debate on Articles of Impeachment, Hearings on H.R. Res. 803 Before the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 42 (1974).

[39]*See* 116 CONG. REC. 11,913 (1970) (remarks of Representative Ford).

> or complicity. And as to the payment of March 21, the evidence appears to establish that it was set up and arranged for by conversations between Dean and LaRue, and LaRue and Mitchell *before* Dean talked to the President on the morning of March 21, so that even if the President was willing, and he had ordered it, as to which the proof falls short, it would appear that this payment was *in train* and would have gone forward, had Dean never talked to the President on March 21 at all.[40]

The record before us, I think, supported my statement.

It was also possible at that time to believe on the evidence that the President had not become fully aware of Watergate until March 21, 1973, and that he was genuinely concerned with possible CIA involvement and consequent national security problems in the days immediately following the Watergate break-in on June 17, 1972. Of course, the Nixon-Haldeman tape of June 23, 1972, which the Special Prosecutor obtained from the Court and which our Committee notably did *not* obtain, made the latter arguments no longer tenable.[41] The President's obstruction of justice as charged was then established beyond a reasonable doubt.

One matter of political judgment remains to be considered here, however. Should a capable and successful President, who has dealt and is dealing masterfully with some of the highest affairs of state, be summarily removed from office because, in a moment of weakness, he agrees to help political lieutenants and friends conceal what can arguably be regarded as a minor political crime, committeed not for financial gain, but in his political behalf during an election campaign? If we dealt with such a mere moment of weakness; if the moment had been regretted and rejected upon second thought; if the guilty had been discharged and the act disavowed; and if a frank and full statement of the case had been promptly made, I believe the answer to this question, in the exercise of a sound political judgment under certain circumstances, might conceivably be "No."

However this may be, nothing of the kind occurred. The cover-up continued and no genuine national security basis for it—the only even possibly viable excuse—was ever established. No President of the United States, in such a situation, can be permitted to deceive and to redeceive the people of America. Such falsification, moreover, renders its author suspect in other par-

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[40] *Debate on Articles of Impeachment, Hearings on H.R. Res. 803 Before the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 42 (1974) (emphasis added).

[41] See note 1 *supra*.

ticulars and denies him the benefit of the doubt once properly extended on other disputed matters in the record.

It is for all these reasons that, after the production of the tape of June 23, 1972, I would have voted, had there been a vote in the House, to convict President Nixon upon Article I. These same reasons, no doubt, led the President to realize that "his deserts [were] small" and that he dared not "put it to the touch, to gain or lose it all."[42] In other words, these considerations led to his speedy resignation.

These same reasons again no doubt impelled Mr. Nixon to accept President Ford's pardon. The pardon was entirely legal under *Ex parte Garland*[43] and was an act of compassion on the part of Mr. Ford. President Nixon's acceptance of the pardon, however, like his statement in August 1974, immediately following disclosure of the fatal tape,[44] was a confession of guilt on his part.

IV. The Judiciary Committee

The House Committee on the Judiciary, its Chairman, and its individual members, have received many compliments on the manner in which they conducted the Nixon impeachment proceedings. It has been said that we enhanced the public perception and appreciation of the Congress; that we functioned in a workmanlike, professional, dignified and judicious manner; and that we restored faith in our constitutional system and demonstrated that it would work as it was designed to do in a constitutional emergency. Speaking generally, I believe that these compliments paid to our Committee are in truth justified.

The staff and Committee members worked hard and, for the most part, conscientiously. Chairman Rodino was astute, diplomatic, dignified and, over all, as fair and judicious as anyone in his exceedingly difficult and highly sensitive political position could reasonably be expected to have been. It is only realistic to recognize, however, that our Committee, as do all human institutions, had its faults. These faults ought to be recognized on a fair appraisal in hope that they might, insofar as possible, be avoided upon any possible similar occasion in the future.

I have said that Chairman Rodino was astute. One of his more astute actions was to persuade the Republican minority that

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[42]James Graham, First Marquess of Montrose, *My Dear and Only Love*, stanza 2.

[43]71 U.S. (4 Wall.) 333 (1866).

[44]For the text of this statement, see N.Y. Times, Aug. 6, 1974, at 1, cols. 4-7.

this historical impeachment inquiry should be handled on an allegedly "nonpartisan" basis, rather than on the bipartisan basis normal to congressional committee procedure. The chief result of this approach was the assembly of a supposedly "nonpartisan" staff which, in practice, however, turned out to be, from the beginning, generally oriented against the position of the former President. This orientation was in large measure due also to the fact that Mr. Albert Jenner—a distinguished Chicago lawyer who was chosen by the minority as the chief minority counsel—from the very beginning agreed on almost every point of law and fact with Mr. John Doar, the Special Majority Counsel of the Committee, and was never at any pains to keep these opinions to himself.

There is no reason to suppose that Mr. Jenner's views were not entirely honest and the result of conviction on his part. Indeed, it can be argued, with some truth, that he was justified by the event. The results of this situation for the course of the inquiry were, nevertheless, unfortunate.

No one, including Mr. Jenner, could have foreseen the ultimate truth leading inexorably to the final result. Many, if not most, of the facts of the inquiry were in dispute or were legitimately subject to different interpretation. Mr. Jenner's views made it impossible for him to provide the minority with an effective presentation of the case for the President, something which badly needed to be done in order to arrive at a true and balanced assessment of the problem. As a result of this situation, it became necessary for the minority members of the Committee—concerned with due process of law, and with justice for the President—to spend more time than should have been necessary to make certain that the case for the President was presented. In the end, the problem became so generally recognized that Sam Garrison, the assistant minority counsel, was requested by minority members of the Committee to present the minority memorandum on the facts and the law. Mr. Garrison and his young assistants did this, and did it well, on far shorter notice than the importance and the complexity of the case warranted.[45]

The lesson to be learned from this episode is that the adversary system is still the best one for getting at the truth. Congressional committees, which are by nature, and properly so, political, function most effectively in their traditional manner, in a fair and honorable but frankly bipartisan fashion.

The Chairman was also diplomatic and astute in successfully riding herd upon, and holding to at least a semblance of judicial

[45] *See Minority Memorandum on Facts and Law, Hearings on H.R. Res. 803 Before the House Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974).

conduct, the anti-Nixon enthusiasts among his own majority—some of whom were ready to vote conviction from the beginning—while at the same time maintaining generally civil relations of mutual respect with the members of the minority. While Chairman Rodino was always able to round up a party-line vote when he felt that one was needed, these results were not necessarily always unjust, nor is this ability generally considered a serious reflection upon a chairman of a congressional committee.

There were other matters, both good and bad, in the work of our Committee. An amazingly complete and truly monumental job was done by our staff under the leadership of John Doar in organizing and presenting written material. On the other hand, we called fewer live witnesses than we should have—E. Howard Hunt being one of the glaring and largely unexplained omissions. We also gave practically no consideration to whether limited or use immunity should be granted in order to avail ourselves of the testimony of such vital witnesses as Haldeman and Ehrlichman, whom our Committee likewise never heard. It was necessary for the minority to fight hard to secure even the relatively complete list of witnesses which were in fact called. This apparent reluctance to call testimony on the part of the majority, and on the part of the majority staff, was surprising and puzzling to me at that time, and still remains so.

Further, no effort was made to take advantage of Mr. Nixon's offer to answer interrogatories. Even though he might not have told the truth, good lawyers could still have posed difficult and pertinent questions. To my mind, it was our obvious and positive duty to obtain in every lawful way every bit of information possible.

One very serious mistake was made by a bipartisan vote of our Committee, which, fortunately, was corrected by vote of the House following debate in which, it is fair to say, I led the opposition to the Committee position. The Committee, under the Chairman's leadership, but, I regret to say, with strong bipartisan support, voted to confine the questioning of witnesses before the Committee to counsel only, with any questions by the members confined to inquiries submitted in writing through counsel.[46] To me, this was an entirely unjustified derogation of the duties and responsibilities of the elected members of the Congress. Final adoption of this procedure, however, required a two-thirds vote of the entire House in order to suspend the rules, and, following the debate on the floor, the motion to suspend the rules was re-

[46] *See Impeachment Inquiry, Hearings on H.R. Res. 803 Before the House Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974).

jected.[47] Consequently, members did question witnesses before the Committee in the usual manner, and we saved ourselves the embarrassment and humiliation which, I am satsified, any other course would necessarily have entailed. I feel that we were able through this vote to vindicate the appropriate and historic rights and privileges of the House of Representatives and also to maintain and strengthen the worth, value, and legitimacy of our entire impeachment inquiry.

A definite plus in our procedure, which followed the better rule of the more recent past and which set a useful precedent for the future, was our extension of liberal privileges to the President's counsel to attend the hearings, to call witnesses, to examine committee witnesses, and to make oral argument. Foolishly we voted that the presidential counsel could only "question" and could not "cross-examine" witnesses called by the Committee,[48] but in practice we largely, and wisely, ignored this patently unfair and impractical distinction.

To my mind, one of the most serious failures of our Committee was its absolute refusal to legally test our subpoena powers vis-a-vis the presidential claim of executive privilege.[49] While it may be admitted that the ordinary procedures for a finding of contempt of the House are clumsy and ill-suited for application to the President of the United States, we could readily have recommended legislation—as proposed by Mr. Railsback of Illinois —which would have given us the authority to sue in court.[50] Alternatively, we could, at least, have adopted the resolution which I offered,[51] under which we would have been instructed by the House to attempt to intervene as amicus curiae in the litigation which was taken to the Supreme Court by the Special Prosecutor, Mr. Jaworski.[52] Had we taken either of these steps, perhaps our Committee, rather than the Special Prosecutor, might have had the honor of securing the vital evidence. We might also have provided ourselves with a valid and defensible third Article of Im-

[47] *See* 120 CONG. REC. H6022-23 (daily ed. July 1, 1974).

[48] *See Impeachment Inquiry, Hearings on H.R. Res. 803 Before the House Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974).

[49] The Committee rejected any effort to seek the aid of the federal courts in enforcing its subpoenas. *See Impeachment Inquiry, Hearings on H.R. Res. 803 Before the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 917-32 (1974). Our subpoenas and accompanying materials are set out in H.R. REP. No. 1305, 93d Cong., 2d Sess. 233-78 (1974).

[50] Mr. Railsback's proposal is set out in *Hearings*, note 49 *supra*, at 917-18.

[51] My proposed resolution, the ensuing debate, and its rejection are set out in *id.* at 932-39.

[52] The Special Prosecutor's litigation culminated in United States v. Nixon, 418 U.S. 683 (1974).

peachment. The Constitution, after all, provides that the "House of Representatives . . . shall have the sole Power of Impeachment."[53] I am confident that the Court would have been at least as receptive to our claims, based on an exercise of that constitutional power against an assertion of executive privilege, as it proved to be in the case of the Special Prosecutor.

By far the worst failure of our Judiciary Committee, and its only disgraceful one, was the constant "leaking" of information to the news media by some members of the Committee and of the Committee staff, in direct violation of our own duly adopted rules of confidentiality.[54] These individuals, I think, honestly believed that the President was guilty and that they should further a guilty finding by consistently and repeatedly leaking, as they did, supposedly confidential evidence which was thought to be detrimental to his interests. Because the Committee minority, for the most part, observed our self-adopted rules and did not reply in kind, the result was a steady, one-sided leaking process directed against the interest of Mr. Nixon. This conduct was no less dishonorable because Mr. Nixon was ultimately shown to be guilty in fact; and the most charitable thing than can be said in this connection is that these individuals believed that the end justified the means—the very doctrine they so vigorously condemned when it was followed by the former President.

I acquit the Chairman of any part or participation in the violation of our rules; however, this proved to be one area in which he was unable to control his troops—and indeed it is very difficult to force an elected member of the Congress to do anything he does not want to do, or to make him behave as a gentleman if he prefers to behave otherwise.

V. Conclusion

There are some sad legacies of Watergate.

The conservative cause in this country—a cause which I believe is important to the well-being and the future of our country—has been set back by the Haldemans, Mitchells, and Ehrlichmans, who were not true conservatives at all, and who apparently believed in nothing but present power and immediate political success. The cause also has been set back, unfortunately, by the ex-President, who performed some great national and international services; and who, I believe, originally had sound beliefs and

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[53]U.S. Const. art. I, § 2, cl. 5.

[54]*See Impeachment Inquiry, Hearings on H.R. Res. 803 Before the House Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974).

principles, but misplaced them somewhere along the road in the vicious struggle for political power.

The conservative cause aside, the entire electorate has, to a substantial degree, been "turned off" in respect to our whole political process. Our nation must recover from this disillusionment, or it will be in serious and lasting trouble.

I like to think, and I believe, that the conduct of the Committee on the Judiciary, on balance, helped to commence this recovery. We faced up to, and, in the end, we dealt successfully with one of the most serious challenges to the rule of law under the Constitution which has occurred in modern American history. The Chairman of the Committee, and each member, is entitled to take pride in his own part in this historical proceeding.

Not least so entitled, I would assert, are those of us who voted in the minority. It is my respectful and considered judgment that it was our unflagging insistance on fair procedure and adequate proof which, as much as any other factor, contributed to a final result which has proved to be acceptable to the great majority of our countrymen.

Notes

A Study of Medical Malpractice Insurance: Maintaining Rates and Availability

I. Introduction

An ugly situation has arisen in the past two years which has precipitated much ill feeling among the professions involved and potentially could have a severe negative effect on the American public—a crisis in the availability of medical malpractice insurance. Although attorneys, insurers, and patients must cope with recent changes in the insurance business, physicians are particularly affected by increased premium rates for insurance to protect them from financial distress in the event of a malpractice suit. The malpractice insurance rate problems have been the subject of numerous medical journal articles and editorials over the last 20 years.[1] In the past, physicians were able to cope with rising premium costs, often passing them on to their patients,[2] and enough companies competed for the business to enable physicians to obtain insurance at some price. Only recently has there been serious concern about the continued availability, even at exorbitant rates, of such insurance.[3]

Presently, both the number of medical malpractice claims and the amounts of settlements and judgments on these claims[4] are on the increase; and as the costs of malpractice suits have increased, so have malpractice premium rates.[5] In fact, some companies no longer consider the risk insurable.[6]

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[1]See, *e.g.*, Tucker, *New Answer to High Malpractice Rates*, 35 Med. Econ. 71 (1958); *Malpractice Insurance Rates*, 86 Calif. Med. 127 (1957); *Problem Clinic: Malpractice Insurance*, 36 Med. Econ. 161 (1959).

[2]"[H]e cannot absorb such mounting costs without some form of reimbursement." *Malpractice Insurance Rates*, 86 Calif. Med. 127 (1957). Often, however, those costs are "passed on to patients, their health care insurance companies, and federal programs." Ribicoff, *Medical Malpractice: the patient vs. the physician*, 6 Trial, Feb.-Mar. 1970, at 10.

[3]*See, e.g.*, Parade, Feb. 16, 1975, at 8; American Medical News, Jan. 6, 1975, at 9, col. 1; N.Y. Times, Jan. 12, 1975, § 5, at 6, col. 2; Wall Street Journal, Dec. 12, 1974, at 10, col. 4.

[4]Bergen, '. . . *not a medical problem*,' 6 Trial, Feb.-Mar. 1970, at 24.

[5]Ribicoff, *supra* note 2, at 13.

[6]Asserting that doctors have become "virtually uninsurable," St. Paul Fire & Marine Insurance Company decided to cease offering traditional insurance coverage. N.Y. Times, Jan. 24, 1975, at 35, col. 1. An insurance

A myriad of medical, legal, social, and economic factors have combined to create this problem. The contribution of each factor to the decline in available and reasonably priced insurance is, however, difficult to ascertain because theories and statistics vary according to their sources. Some studies attribute the increases in malpractice claims and awards to a rise in the demand for medical services disproportionate to the number of practicing physicians. Thus, the probabilities of a malpractice claim are increased.[7] Others consider the sophistication of modern medical practice a cause. As therapeutic developments "offer both greater potential benefit and significantly more risk than heretofore,"[8] there is an increased likelihood of medically induced complications in no way related to malpractice. Even the media is criticized for fueling patients' expectations that modern medicine can effect cures for almost any ailment[9] and for triggering litigation through extensive coverage of high malpractice judgments.[10]

In a vicious circle, physicians, attorneys, and insurance companies blame one another for creating and aggravating the problem. Physicians criticize attorneys for abusing the contingent fee system;[11] both groups berate insurers for having impersonal business philosophies.[12] The medical profession itself is attacked by attorneys, insurers, and patients for its diminishing physician-patient rapport and for permitting malpractice misadventures.[13]

Whatever the impetus, the expensive cycle continues, as higher judgments and settlements result in increased costs for insurance coverage. These costs are passed on to patients, who are now inclined to sue when dissatisfied with treatment and faced with high bills for medical care.[14] As one attorney explains:

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industry source is quoted as saying: "Unless there are drastic changes, the industry feels that malpractice is an uninsurable risk." *Moves Afoot To Shore Up Sagging Malpractice Coverage*, 10 HOSP. PRAC. 24, 25 (1975).

[7]Bergen, *supra* note 4, at 24. "Insurance companies report that in growing suburban areas, malpractice suits tend to rise in some direct proportion to the population growth." Ribicoff, *supra* note 2, at 10.

[8]Dornette, *Medical Injury Insurance—A Possible Remedy for the Malpractice Problem*, 1 J. LEGAL MED. 28 (1973). *See also* Smith, *The Malpractice and the Insurance Carrier*, 64 J. MED. ASS'N GA. 10 (1975).

[9]Pohlman, *Testimony on Malpractice Insurance*, 70 OHIO MED. J. 656 (1974).

[10]Ribicoff, *supra* note 2, at 10.

[11]Pohlman, *supra* note 9.

[12]Gibbs, *Insurance Crisis: Availability to Physicians in Jeopardy*, 3 J. LEGAL MED. 29 (1975).

[13]*Id.*

[14]Ribicoff, *supra* note 2, at 11. "Studies of insurance companies and medical societies show that a large percentage of malpractice suits are filed in reaction to high bills and bill collection agency tactics." *Id.*

> There's been a mixed reaction to that $4,000,000 award—a grudging admiration for the brilliance of the attorney who won it, but a lot of shaking of heads to the effect that this is getting awfully close to killing the goose that lays the golden eggs.[15]

The subject of medical malpractice extends too far to allow a comprehensive study of its causes, frequency of occurrence, ability to be controlled, and overall effect within the limited space of one Note. Therefore, this Note will focus on the problem of maintaining the availability of medical malpractice insurance at reasonable cost. To present some background in the area before offering any solutions, this Note will examine the role of the insurance company: the need for professional liability insurance,[16] the factors that have caused companies to retreat from the business, the effect of substantial increases in the number of claims and the amounts of judgments and settlement on premium rate-setting, and the manner and means of state regulation of insurance. Within that scope, the Note will examine proposed and enacted legislation dealing with malpractice insurance and analyze possible means by which states can maintain insurance availability and supervise rates through control of an insurer's activities. Finally, the Note will suggest a workable solution, composed of elements from recently enacted legislation, proposed bills, and existing statutory powers.

II. The Malpractice Insurance System

A. The Need for Insurance

Malpractice insurance plays a vital role in a legal system in which fault is the basis of liability. Much has been written about the viability of systems of compensation for medical injury which would not require any determination of fault. The discussion has centered on suggestions of strict liability in the form of no-fault medical insurance funds,[17] patients' self-insurance against surgical

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[15]121 Cong. Rec. S305 (daily ed. Jan. 16, 1975) (remarks of Senator Nelson).

[16]The terms "malpractice insurance" and "professional liability insurance" will be used interchangeably in this Note.

[17]*See, e.g.*, S. 215, 94th Cong., 1st Sess. (1975), which would establish a medical injury compensation fund supported by premiums charged to participating health care providers. Strict liability for medical maloccurrences would be optional under the plan, which also would provide federal malpractice insurance for traditional tort law suits, if patients choose not to bring claims in the federal no-fault system.

risks, similar to "trip insurance,"[18] and some form of social insurance.[19] Although no state has legislatively authorized a complete departure from the traditional tort system, debate continues as to the advantages and disadvantages of instituting such plans.[20] Under a tort theory, a physician must have negligently caused an injury in order to be held liable for money damages to the injured party. On the other hand, a purely compensatory system would

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[18]U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 128 (1973) (Hoffman, Dissenting Statement) [hereinafter cited as HEW REPORT]. The dissenting statement describes patients' self-insurance as similar in theory to health, disability, accident, and life insurance. Limited to surgical patients, insurance could be purchased by an individual to cover any unanticipated adverse consequences upon entering the hospital. Insurance benefits received under the plan would be offset against damage awards. In a variation of that idea, a physician could surcharge patients for surgical events and pay the surcharge to his insurer prior to performing the operation. In the event of medically induced injury to the patient or a worsened condition, and in place of damages, the insurer would compensate the patient for medical expenses and loss of income, and make some adjustment for pain and suffering as well as future detriment. *See* Brophy, *Why is Coverage for Errors and Omissions Evaporating? What Can be Done About It?*, A.B.A. SECT. INS., NEGLIG., & COMP. L. PROCEEDINGS 354 (1970).

[19]Social insurance is explained as a government-financed disability system concerned only with the fact that a disability arose in connection with medical treatment, whether or not it was an expected or even beneficial result of treatment. Rubsamen, *No-Fault Liability for Adverse Medical Results—Is it a Reasonable Alternative to the Present Tort System?*, 117 CALIF. MED. 78, 91 (1972). A fallacy of the proposal is that compensation would not be available for a patient whose condition remained unaltered by treatment, though negligently so, while a patient whose disability resulted necessarily from a life-saving operation would be covered. *Id.* A limited form of social insurance would be similar to workmen's compensation, with strict requirements as to compensable disabilities. The plan would necessitate a determination of causation to ascertain whether a patient's physical condition arose out of and in the course of treatment or was pre-existing. "[B]enefits would be scheduled by legislative enactment depending on the type and extent of injury, without regard to negligence, and claims would be handled by state officials or boards." 1 D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE § 1.07, at 12 (1973).

[20]*See, e.g.*, Dornette, *supra* note 8, at 28. One medical-legal authority offers the example of Massachusetts' no-fault automobile liability insurance to show that the number of claims and average claim costs should decrease substantially. *Id.* Another authority foresees a flood of administrative proceedings for establishing causation and determining compensable events, and a continued need for analysis of medical facts to separate preventable from truly unpreventable, recognized risks of treatment. Rubsamen, *supra* note 19, at 83-84. Rubsamen also points out constitutional problems of equal protection in denying tort actions and jury trials for patients suing physicians and hospitals, but not for tort actions against others in society, noting that no-fault automobile statutes apply only to comparatively minor injuries, the tort system covering the rest. *Id.*

not require proof of malpractice for a patient to merit compensation for medical injuries. Since a physician assumes responsibility under the tort system for medical injuries he causes, insurance can help him bear financial liabilities he might incur. The risk of a malpractice judgment shifts to the insurer in exchange for the consideration of the premium price.

The hesitancy of states to abandon tort liability in the face of the insurance crisis echoes the opinion of the Department of Health, Education, and Welfare Commission on Medical Malpractice regarding no-fault and other medical injury compensation systems: "The Commission . . . does not believe that we should leap headlong from a system that works (with however many faults) into an untested one that may cause even more severe problems."[21] Putting the merits of the various alternatives aside, as long as the present system requires that physicians be held responsible for medical injuries negligently induced by malpractice,[22] professional liability insurance will be essential.[23]

B. The Nature of a Malpractice Insurance Contract

Whether for physicians, attorneys, architects, or engineers, malpractice insurance is by definition specialized and limited in coverage as compared to comprehensive insurance; nevertheless malpractice policies are very similar to general liability insurance policies.[24] In its most simplified terms, a liability insurance policy is defined as a contract whereby one party, the insurer, agrees to assume loss or liability imposed by law on the other party, the insured, in exchange for a specified consideration, a premium.[25] More particularly, professional liability insurance protects physicians, attorneys, or other members of a profession from liabil-

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[21]HEW REPORT, *supra* note 18, at 101.

[22]"Medical malpractice" is defined as the failure of a physician or surgeon to exercise the required degree of care, skill, and diligence. The standard is stated as follows:

> A physician need only exercise the ordinary degree of skill, care, and judgment exercised by members of his profession practicing in the same or a similar locality in the light of the present state of medical science.

1 R. LONG, THE LAW OF LIABILITY INSURANCE § 12.01, at 12-2 (1975).

[23]The Secretary's Commission found that continued availability of adequate malpractice insurance was an "absolute necessity." HEW REPORT, *supra* note 18, at 38.

[24]1 LONG, *supra* note 22, § 1.02, at 1-4. The insurable interest under a liability insurance contract is the legal obligation of the insured to pay damages for injury to another resulting from his carelessness. *Id.* § 1.05, at 1-10.

[25]*Id.* § 1.02, at 1-4.

ity arising from special risks inherent in the practice of their profession.[26]

Many conflicts similar to those arising from general liability policies appear in a professional liability insurance context. Since insurance companies dictate and draft the terms of standard form insurance policies,[27] these policies are recognized as classic examples of adhesion contracts.[28] The potential insured party, with little or no bargaining power as to the terms of the contract, has only a choice among standard insurance provisions. An opportunity for oppression underlies such contracts, especially since the insured, unlike some other consumers dealing with standardized contracts, receives only the conditional promises of the policy as his benefit in the bargain. Therefore, there exists a possibility that the insurer may avoid its responsibilities.

From the liability insurer's point of view, however, the selection and limitation of the risks he assumes is vital in order to meet the financial burdens of the business. Courts have recognized this need and have held that insurance provisions limiting liability do not violate public policy if the terms are unambiguous.[29] "An insurer may limit the risk it assumes and fix its premium accordingly,"[30] and if it is unwilling to cover certain risks, it may exempt them from policy coverage.[31] Beyond the wording of the policy, insurance underwriters also attempt to control their risks by carefully selecting whom to insure.

To counterbalance the apparent control given to insurance companies in liability insurance transactions, a number of court decisions have favored the insured party. For example, professional liability policies are subject to the rule that courts will interpret adhesion contracts in light of the insured's reasonable ex-

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[26]Grieb v. Citizens Gas Co., 33 Wis. 2d 552, 556-57, 148 N.W.2d 103, 106 (1967).

[27]"Even the provisions prescribed or approved by legislative or administrative action ordinarily are in essence . . . adoptions . . . of proposals made by insurers' draftsmen." R. KEETON, BASIC TEXT ON INSURANCE LAW 350 (1971). *See also* Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631 (1943).

[28]Zogg v. Penn Mut. Life Ins. Co., 276 F.2d 861 (2d Cir. 1960); Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 332a (Tent. Draft No. 6, 1960); Schultz, *The Special Nature of the Insurance Contract: A Few Suggestions for Further Study*, 15 LAW & CONTEMP. PROB. 376, 379 (1950).

[29]Samuel N. Zarpas, Inc. v. Morrow, 215 F. Supp. 887 (D.N.J. 1963); Sherwood v. Stein, 261 La. 358, 259 So. 2d 876 (1972); Lehr v. Professional Underwriters, 296 Mich. 693, 296 N.W. 843 (1941).

[30]1 LONG, *supra* note 22, § 12.10, at 12-14.

[31]*Id.*

pectations.[32] If doubt or ambiguity exists in a policy, the question will be resolved against the insurance company.[33] As a result, an insured has some leverage in a dispute as to coverage under his contract.

Several provisions found in professional liability insurance contracts also operate to an insured party's advantage. Medical malpractice policies offer cancellation provisions that allow the physician to deliver the policy to the insurer with notice of cancellation at any time. The company, however, must deliver notice to the insured or his agent ten days in advance of the cancellation date.[34]

Another provision peculiar to medical malpractice insurance policies,[35] the settlement clause, offers physicians considerable control. This clause gives a physician the right to determine whether his insurance company should settle a particular claim or suit.[36] However, if the physician refuses to settle and the insurance company loses the suit, the company's liability might be limited to the settlement offer.[37] Conversely, the refusal of an insurer to accept a reasonable settlement offer satisfactory to its insured may establish the company's liability for the full judgment, even if it exceeds policy coverage limits.[38] One policy form provides

[32]Orion Ins. Co. v. Firemen's Ins. Co., 46 Cal. App. 3d 374, 120 Cal. Rptr. 222 (1975); Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966); Corgatelli v. Globe Life & Accident Ins. Co., 96 Idaho 616, 533 P.2d 737 (1975).

[33]Casey v. Transamerica Life Ins. & Annuity Co., 511 F.2d 577 (7th Cir. 1975); Leist v. Auto Owners Ins. Co., 311 N.E.2d 828 (Ind. Ct. App. 1974); Town & Country Mut. Ins. Co. v. Owens, 143 Ind. App. 522, 241 N.E.2d 368 (1968); Safian v. Aetna Life Ins. Co., 260 App. Div. 765, 24 N.Y.S.2d 92 (1940).

[34]U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, APPENDIX TO REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 508 (1973) [hereinafter cited as HEW APPENDIX]. Realistically, physicians are not likely to cancel policies with frequency, so the benefits of the provision are few.

[35]*Id.* at 109. *But cf.* Bergen, *supra* note 4, at 25 (written consent is also required for an attorney's malpractice settlement).

[36]Note, however, that some companies have eliminated the provision, believing that the individual doctor is not in a position to judge negligence. Other carriers have written provisions in group plans that either the individual doctor or some sort of peer review committee must give consent in order to settle a claim. HEW APPENDIX, *supra* note 34, at 508.

[37]Hirsh, *Insuring Against Medical Professional Liability*, 12 VAND. L. REV. 667, 679 (1959); McNeal, *Patients, Litigation and Patience*, 33 INS. COUNSEL J. 408, 410 (1966).

[38]Traditionally, only if the insurer was guilty of bad faith in refusing an offer of settlement would it be liable for the entire amount of a judgment against its insured without regard to policy limits. *See* State Farm Mut. Auto. Ins. Co. v. Skaggs, 251 F.2d 356 (10th Cir. 1957); Dairyland Ins. Co. v. Hawkins, 292 F. Supp. 947 (S.D. Iowa 1968); Critz v. Farmers Ins. Group,

that if the insured physician refuses to settle, the matter can be submitted to an advisory committee of the state medical society. That committee's majority decision is made binding on the insurer and the insured.[39]

Another policy provision extending advantages to the insured party deals with coverage limitations. At present, many medical malpractice and other professional liability policies are written on a "claims-incurred" or an "occurrence" basis, as opposed to a "claims-made" basis. The traditional "occurrence" policy insures against liability arising from incidents occurring within the policy dates, regardless of when claims are made.[40] "Claims-made" policies, on the other hand, only insure against those claims brought within the coverage dates of the policy.[41] Claims initiated after expiration of the policy, although based on acts occurring within policy dates, are excluded from coverage in claims-made policies. The advantage of "occurrence" provisions is, therefore, that an insured physician is protected for years after the possible commission of a negligent act.

C. Risk-Spreading Among Liability Insurance Companies

Before entering the malpractice or any liability insurance market, companies must consider how they will bear the risks. Within the insurance industry, companies spread the risks they carry by means of reinsurance contracts with other insurance companies. The need for reinsurance depends on the size of the primary carrier. Large companies who carry a full line of insurance find it less essential than smaller companies, who are more

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230 Cal. App. 2d 788, 41 Cal. Rptr. 401 (1964); Note, *Liability Insurance—A Move To Limit the Excess Judgment Damages Award*, 42 FORDHAM L. REV. 439, 440 (1973). In Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967), the California Supreme Court altered the traditional "bad faith" standard of dishonest or fraudulent dealings to include unreasonableness of behavior. In *Crisci* the insurance company's refusal of a settlement agreeable to the insured constituted unreasonable behavior. The legal presumption in *Crisci* is further defined in Garner v. American Mut. Liab. Ins. Co., 31 Cal. App. 3d 843, 107 Cal. Rptr. 604 (1973). In that case, the insurance company was held liable for a judgment greater than the policy limits because it failed to accept a reasonable settlement offer. In Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973), as in *Crisci*, the California Supreme Court recognized tort damages for emotional distress suffered by an insured because the insurer did not settle the claim in good faith.

[39] 1 LONG, *supra* note 22, § 12.08, at 12-11. *See* Garner v. American Mut. Liab. Ins. Co., 31 Cal. App. 3d 843, 107 Cal. Rptr. 604 (1973).

[40] Comment, *The "Claims Made" Dilemma in Professional Liability Insurance*, 22 U.C.L.A.L. REV. 925 (1975).

[41] *Id.*

specialized and who utilize reinsurance in order to compete with the larger companies.[42] Relatively few insurance companies actively engage in reinsurance,[43] although the availability of reinsurance is of vital concern to issuers of malpractice policies. Thus, although established liability insurers at present have few difficulties in obtaining reinsurance, evidence indicates that formation of new companies is limited by a "thin" malpractice reinsurance market.[44]

Another way in which established liability insurance companies spread risks is by writing umbrella policies which cover liabilities expressly excluded from or not mentioned in basic policies; they also write excess insurance which covers liability for damages exceeding those covered by other valid and collectible insurance. The purchase of an umbrella or excess policy is predicated on the existence of a primary malpractice policy with certain minimum limits.[45] If two companies are involved, one offering primary coverage and another selling other protection to the same insured, the financial risks are divided between them. At the same time, the physician is insured against the possibility that losses within the coverage period will be greater than the liability covered by the primary policy.

A third but less often utilized means of transferring risks consists of offering a deductible clause in the policy. Companies can afford to lower premium costs to insured parties and to provide insurance to high risk medical specialties if insurers know they will not be liable for certain minimum claim losses or for defense costs. To a degree, a deductible clause makes physicians self-insurers on some expenses.

III. The Economics of Malpractice Insurance

A. Rate Setting and Investment of Income

The basic objective of an insurance company is to sell insurance at a competitive and profitable rate. This rate is determined by actuaries, who predict future losses and expenses that must be

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[42]HEW Report, *supra* note 18, at 39.

[43]HEW Appendix, *supra* note 34, at 546 (while there are hundreds of companies engaged in primary casualty insurance, there are only two dozen companies in the United States mainly engaged in reinsurance).

[44]*Id.* at 523, 547.

[45]Malpractice policies are usually written with a given dollar limit per occurrence and an aggregate limit on all occurrences per policy year. *Id.* at 505. A typical policy has limits of $100,000 per occurrence and $300,000 per year. High-risk doctors may have difficulty obtaining umbrella coverage if their primary insurance covers less than $200,000/$600,000. *Malpractice Insurance Outlook: Brightening*, 48 Med. Econ. 103, 104 (1971).

paid from present premium income. Although the actuarial principles are similar for all lines of liability insurance,[46] rate setting in the malpractice area presents unique difficulties and demands a high degree of expertise.

Early rate structures failed to take into account the extended delay between an injury and the filing of a malpractice claim, and actuaries failed to anticipate a substantial increase in the number of malpractice suits.[47] Due to the nature of medical malpractice litigation, insurance companies must set aside large reserves to meet future claims,[48] and when the amount is underestimated, companies faced with excessive losses have been forced to withdraw from the market.[49] Dramatic changes over the last 10 years in the frequency and size of malpractice claims,[50] as well as inflation, have complicated the estimation. During an economic recession, the value of insurance reserves declines, making malpractice liability insurance less attractive to insurers,[51] who rely on reserves for investment funds.

The malpractice insurance market is so small in proportion to the entire liability insurance business that it is difficult to formulate malpractice rate structures;[52] therefore individual carriers have insufficient loss experience data to establish a valid rating base.[53] Actuaries take into account a physician's specialty, practice, geographical location, and the amount of requested coverage when determining his premium rate. Physicians in the most hazardous specialties pay much higher premiums than those in the lowest rate category. As claims payments and legal defense costs have risen, however, premium rates for all classes have in-

[46]Insurers develop rates to produce sufficient premium volume to cover losses and administrative expenses and to provide a margin for contingencies and profit.

[47]HEW APPENDIX, *supra* note 34, at 511; Brant, *Medical Malpractice Insurance: The Disease and How To Cure It*, 6 VALP. U.L. REV. 152, 163 (1972).

[48]One company reported that malpractice insurance accounted for only 5% of its total premiums but for 10% of its reserves. Uhtoff, *Handwriting on the Wall*, 70 N.Y.J. MED. 1673 (1970).

[49]Ribicoff, *supra* note 2, at 13; Sanders, *Money Well Spent*, 6 TRIAL, Feb.-Mar. 1970, at 16.

[50]Three times as many malpractice suits were filed in the greater-Detroit circuit courts in 1974 as in 1970. N.Y. Times, Aug. 3, 1975, at 41, col. 5.

[51]Wall Street Journal, Jan. 20, 1975, at 1, col. 6.

[52]The premium volume for medical professional liability insurance does not exceed 2.5% of the total property-liability insurance premium volume. HEW REPORT, *supra* note 18, at 41. *Cf.* HEW APPENDIX, *supra* note 34, at 511 (1%). Other government statistics indicate that only 0.3% of the billions of dollars garnered annually by fire and casualty underwriting represents medical professional liability insurance. Gibbs, *supra* note 12, at 29.

[53]HEW REPORT, *supra* note 18, at 44; HEW APPENDIX, *supra* note 34, at 529.

creased sharply.[54] Malpractice policy protection contains higher limits than in the past in order to protect adequately against rising claim amounts.[55] The higher limits alone, however, do not account for rates increasing as much as 949% for surgeons and 541% for other physicians in the 10 years from 1960 to 1970.[56] Insurance companies continue to insist that malpractice insurance is a poor business proposition.[57] One cogent argument supporting that contention is that increasing defense costs and claim losses[58] have di-

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[54]In New York, while premiums increased 332%, insurers' losses increased 375%. Uhtoff, *Medical Malpractice—The Insurance Scene*, 43 ST. JOHN'S L. REV. 578, 586 (1969).

[55]In 1950 policy protection rarely exceeded $100,000, while in 1972, 90 percent of practicing physicians had larger policies, the average protection being $300,000. Brant, *Medical Malpractice Insurance: The Disease and How To Cure It*, 6 VALP. U.L. REV. 152, 158 (1972).

[56]Between 1960 and 1970, premium rates rose 115% for dentists, 540.8% for physicians and 949.2% for surgeons. HEW REPORT, *supra* note 18, at 13. Other statistics add perspective to the HEW figures. For example, in New York between 1950 and 1967, the size of the average malpractice premium rose 170%, the consumer price index 36%, physicians' fees 81%, and hospital costs 246%. Uhtoff, *Medical Malpractice—The Insurance Scene*, 43 ST. JOHN'S L. REV. 578, 586 (1969). A more recent table shows the cost of a standard malpractice policy in Ohio in 1969 and 1974, with increases ranging from $109 to $475 for class 1 physicians (no surgery) and from $1080 to $3217 for class 5 physicians. Pohlman, *supra* note 9, at 656. Some specialists now pay as much as $30,000 a year for liability protection. NEWSWEEK, June 9, 1975, at 60.

[57]Smith, *supra* note 8, at 10. "Not one insurer has made money in writing medical insurance in recent years." Brant, *supra* note 55, at 6 (no authority given). *See Important Information on Professional Liability & Defense*, 69 N.Y.J. MED. 2427, 2428 (1969) (*Table: Malpractice Insurance Losses in New York*). *See also* Dornette, *supra* note 8, at 31 (table analyzing distribution of malpractice insurance premiums indicates significant loss).

[58]Although statistics on defense costs are relatively scarce compared with the wealth of information on premium increases, it has been estimated that of malpractice insurance costs, 30% represents the amount recovered by the patient, while 15% goes to the patient's attorney, and 55% is consumed by defense attorney fees and defense investigation. Ribicoff, *supra* note 2, at 13. High defense costs are attributed to the complexity of malpractice litigation, which requires expert medical testimony, expensive diagnostic procedures, and experienced legal counsel, even if the claim is settled prior to trial. Brant, *supra* note 55, at 159. Despite 1972 HEW statistics indicating relatively few claims leading to large settlements or judgments (6.1% exceeding $40,000), it was recognized that the number of large awards or settlements was increasing. HEW REPORT, *supra* note 18, at 10. A medical-legal authority states, however, that

> [a]wards and settlements in six and seven figures are extremely rare. In 1970, they accounted for only 3 percent of all payments to plaintiffs. Even in this group, the great bulk are within $300,000.

Curran, *The Malpractice Insurance Crisis*, 293 NEW ENG. J. MED. 24, 25 (1975). Insurance industry sources reported the average malpractice settle-

minished the pool of potential investment capital. American Insurance Association statistics report that policies in force during 1966 generated $13.6 million in premiums, but that by 1974, claims covered by 1966 policies had caused $18.2 million in losses.[59]

A number of noninsurers contend that the carriers' losses merely represent declining profits[60] because the insurance industry's concept of profit is underwriting profit, not net profit from the total funds invested, regardless of the source of the funds.[61] Underwriting profit is calculated by subtracting incurred losses and expenses from the amount of earned premiums. This calculation does not include investment income, with the result that insurers can incur high loss premium income ratios yet still make a profit from returns on the investment of their reserves.[62] The vagaries of economic and stock market trends have unquestionably had an impact on insurance company business planning. Fire and casualty insurers suffered sizeable stock market losses in 1974 and 1975.[63] The issuance of malpractice policies appears particularly vulnerable in such a situation, because most companies consider malpractice insurance a marginal venture. Whenever a company decides upon a curtailment of its activities, medical malpractice insurance is considered expendable.

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ment in 1970 as $5000, and in 1973 as $8000, but noted that a $1 million judgment is becoming less unusual, particularly in California. 33 CONG. Q. WEEKLY REP., April 5, 1975, at 709. Other authorities suggest that costs are actually increasing at a disproportionate rate, noting that the average cost per claim in New York rose from $6,000 in 1965, to $23,400 in 1975, and pointing to the fact that 13 of the judgments or settlements over $1 million in New York history have occurred within the last 28 months. NEWSWEEK, June 9, 1975, at 59.

[59]NEWSWEEK, June 9, 1975, at 63.

[60]According to one physician, the formula "cost plus profit equals premium" has made insurance a powerful and successful venture. *Id.* An attorney expressed the opinion that if insurance companies were to make their books public, "we'd find their claims are spurious." *Id.* at 65. There is little official data backing up insurance company reports of unprofitability except that more claims are filed and paid. 33 CONG. Q. WEEKLY REP., April 5, 1975, at 709.

[61]King, *A Critique of the Report of HEW's Medical Malpractice Commission*, 2 J. LEGAL MED., Mar.-Apr. 1974, at 49, 51. Comment, *Insurance Ratemaking Problems: Administrative Discretion, Investment Income, and Prepaid Expenses*, 16 WAYNE L. REV. 95, 101 (1969).

[62]HEW APPENDIX, *supra* note 34, at 522-23. *But see* 121 CONG. REC. 1288 (1975) (remarks of Representative Hastings). Employers Insurance of Wausau lost $120 million over 25 years, even taking into account income earned from their reserves, and at least two other companies—California Insurance Exchange and Casualty Insurance Company of California—"went broke offering this type of coverage." *Id.*

[63]Wall Street Journal, Aug. 11, 1975, at 4, col. 2.

B. Insurance Company Responses to Losses

Faced with substantial financial losses caused by actuarial and investment miscalculations, insurance companies have few alternatives. They may become increasingly selective about which physicians to insure,[64] tighten policy provisions governing the scope of their assumed risk,[65] continue to raise malpractice premium rates,[66] or withdraw from the malpractice market completely.[67]

One company that was compelled to pursue the most drastic alternative, discontinuing its malpractice insurance line, was Argonaut Insurance Company, a subsidiary of Teledyne Corporation. Although the facts are in dispute, the Argonaut incident illustrates the insurers' predicament. The incident also reflects the reluctance of insurers, when justifying business decisions, to statistically separate losses resulting from general economic trends from losses attributable to the peculiarities of malpractice insurance.

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[64]In response to reduced surpluses caused by economic reverses in stock and bond markets, casualty insurance companies immediately began to change their "book of business" and stopped renewing the highest risk classes of medical liability insurance. Cast, *Indiana's Medical Liability Problem*, 68 J. IND. MED. ASS'N 21 (1975). *See also* Smith, *supra* note 8, at 10. The president of St. Paul Fire & Marine Insurance Company, which insured about 17% of the physicians in the U.S., claimed it did not have the capacity to take on any new malpractice policyholders except where the company was sponsored by a state medical society and would not renew existing policies except in states where insurances departments permitted the company an adequate rate for profitmaking. In Indiana, for example, St. Paul stopped renewing the two riskiest specialty classes. MED. WORLD NEWS, July 28, 1975, at 76.

[65]Comment, *Risk Control in Professional Liability Insurance*, 1960 DUKE L.J. 106, 107.

[66]Premium rates trigger intense reactions in the medical world.

> Rate increases stem from fear of future losses, not from current experience, and companies tend to ask for all they think they can get to protect against future fiscal calamity.

10 HOSP. PRAC. 24 (1975). Massachusetts physicians have expressed concern that insurance carriers are attempting to collect higher premiums than are necessary to cover actual and projected losses in Massachusetts, which used to rank as one of the six lowest risk states. The physicians allege that the higher premiums are used to offset losses in investment portfolios and in other higher risk areas of operation. Gibbs, *supra* note 12, at 29.

[67]Pacific Indemnity & Star Insurance Company unexpectedly withdrew from the malpractice field at the end of 1974. Los Angeles Times, Jan. 7, 1975, § I, at 1, col. 1. Earlier, in 1969, the Nettleship Company, a combine of insurance companies providing malpractice insurance in Southern California, "lost $22 million . . . with the result that six companies ended participation with the combine." Jarrett, *Arizona's Medical Association Malpractice Insurance Plan*, 27 ARIZ. MED. 12 (1970).

In 1974, the insurer of the New York State Medical Society's program withdrew its insurance coverage, and Argonaut contracted to be the new carrier. According to one source, Argonaut believed it could succeed where Employers of Wausau had failed as Argonaut was new to the program and had doubled existing premium rates. Owing to the delay of several years between premium collections and payouts for claims, the company reasoned that it could collect a large reserve in premium income to invest before having to pay out much in claims.[68] The company also expected to allocate most of the business to reinsurers. However, Arognaut could not interest reinsurers and ended up holding the majority of the business.[69] When company statistics indicated heavy losses and Argonaut's requests for large rate increases met with resistance from the state insurance superintendent,[70] Teledyne insisted that Argonaut cease its malpractice insurance business when the group plan expired on June 30, 1975. It has not been established whether Teledyne handed down the ultimatum because of losses from Argonaut's stock market investments[71] or, as Teledyne contends, because "actuarial projections of huge losses . . . threatened to make Argonaut insolvent."[72] A third reason suggested by Argonaut's former president is that "Argonaut's ability to write medical liability policies was 'curtailed' by its parent company's withdrawal of a $21 million tax credit last September [1974]."[73] Whatever the reason, the result was that New York, Florida, California, and four other states were adversely affected by Argonaut's withdrawal from the field.[74] A House Subcommittee on Public Health and Environment is examining Argonaut's loss projections to determine if they were highly inflated.[75]

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[68]MED. WORLD NEWS, Feb. 24, 1975, at 22-23.

[69]10 HOSP. PRAC. 24, 33 (1975).

[70]Curran, *Malpractice Insurance*, 292 NEW ENG. J. MED. 1223, 1224 (1975). Argonaut received a 93.5% premium increase in June 1974, but its request for a 196.8% increase to continue coverage after January 10, 1975, was rejected. 16 MED. WORLD NEWS, July 28, 1975, at 76.

[71]MED. WORLD NEWS, Feb. 24, 1975, at 23.

[72]*Id.*, July 14, 1975, at 23. For statistics on Argonaut's financial downfall, see Regier, *Insurer's Insecurity*, 3 J. LEGAL MED., Jan. 1975, at 32.

[73]MED. WORLD NEWS, July 14, 1975, at 23.

[74]*Id.*, July 28, 1975, at 76. Ironically, however, Argonaut still writes malpractice insurance in Hawaii and makes a profit there. *Id.*

[75]*Id.*

IV. Public Interest and State Regulation of Insurance

A. The Responsibility of Insurance Companies

Insurance companies attempt to exercise reasonable business sense in eliminating financial risks to curtail losses. It is argued, however, that insurers should not have independent power to take extreme actions. Insurance companies have been criticized as

> woefully lacking in any recognition of the fact that their business must be geared to public interest. The industry has a duty to the public, a responsibility to the public and an accountability to the public. It cannot be given license to underwrite losses and then get out of the less profitable areas and concentrate on selling types of insurance where it collects premiums and pays out few losses.[76]

Indeed, there are constant echoes of statements suggesting that insurance companies should assume greater responsibility in reducing malpractice insurance problems.[77]

The insurance industry can utilize its resources beneficially by researching new techniques of risk selection, ratemaking, reinsurance and claims prevention, and establishing more refined statistical data collection systems on malpractice claims and costs. If insurers publicized information as to premiums collected, amounts of reserves, investment income, and ratios of premiums to claims payments, and reviewed their underwriting practices more stringently, the exercise of state regulatory powers to demand such information would be unnecessary.

B. State Regulation of Insurance

The business of insurance is affected with a public interest and is therefore subject to reasonable regulation by the state.[78] One explanation for the public interest aspect of insurance is that it has become such an important mechanism for shifting risks within our economic system that supervision is essential to assure

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[76]Low, *Malpractice Suit Citizen's Weapon*, Atlanta Journal, Mar. 4, 1975, at 15A.

[77]*See, e.g.*, Bernzweig, *Lawsuits: A Symptom Not a Cause*, 6 Trial, Feb.-Mar. 1970, at 14, 15.

[78]California State Auto. Ass'n Inter-Ins. Bureau v. Maloney, 341 U.S. 105 (1951); Lewis v. Manufacturers Cas. Ins. Co., 107 F. Supp. 465 (W.D. La. 1952); Bouis v. Aetna Cas. & Sur. Co., 91 F. Supp. 954 (W.D. La. 1950); Department of Ins. v. Schoonover, 225 Ind. 187, 72 N.E.2d 747 (1947). Regulation of malpractice insurance might also be deemed appropriate in light of the state concern in licensing of physicians. *See, e.g.*, Ind. Code §§ 25-22-1-1 to -11-2 (Burns 1974).

the solvency of insurers.[79] This interest in solvency requires some regulation of rates since the industry cannot effectively function in an atmosphere of unrestrained competition. For example, severe competition might lead to deceptive and unsound financial practices such as reducing premium rates below a level sufficient to cover losses.[80] The main reason for government regulation, therefore, is to protect the public from the effects of destructive competition and, at the same time, from the excesses resulting from collaborative activity.[81]

Historically, the regulation of insurance was viewed as a state concern and was not regulated by the Federal Government through commerce clause powers, even though policy contract transactions stretched across state lines.[82] However, in 1944 the Supreme Court held in *United States v. South-Eastern Underwriters Association*[83] that the business of insurance involves interstate commerce subject to federal regulation. As a consequence, federal antitrust laws were made applicable to the regulation of insurance, thus prohibiting collaboration among companies for purposes of pooling loss statistics and fixing rates—actions the state laws had permitted. Confusion in the insurance industry and the state governments as to the application of the *South-Eastern Underwriters* decision led Congress in 1945 to pass the McCarran-Ferguson Act[84] to clarify federal intentions.

The McCarran-Ferguson Act provides that no federal law shall impair any state law regulating insurance unless the federal law specifically relates to the business of insurance.[85] Federal antitrust laws, therefore, apply only to the extent that the insurance business is not regulated by state antitrust law.[86] Only a

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[79]Dineen, Gardner, & Proctor, *Insurance and Government*, in SYMPOSIUM ON INSURANCE AND GOVERNMENT, UNIVERSITY OF WISCONSIN, 1960, Vol. II, No. 1, at 12.

> Since the insurance consumer purchases a policy with the expectation that claims made under it will be paid, the insurer bears a fiduciary responsibility to him which requires the insurer's continuing financial stability.

Note, *Insurance Regulation and Antitrust Exemptions: McCarran-Ferguson, the Boycott Exception, and the Public Interest*, 27 RUTGERS L. REV. 140, 156 (1973).

[80]Dineen, Gardner, & Proctor, *supra* note 79, at 14.

[81]Comment, *Insurance Ratemaking Problems: Administrative Discretion, Investment Income, and Prepaid Expenses*, 16 WAYNE L. REV. 95, 97 (1969).

[82]United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 547-48 (1944).

[83]322 U.S. 533 (1944).

[84]Act. of Mar. 9, 1945, ch. 20, §§ 1-5, 59 Stat. 33-34 (codified at 15 U.S.C. §§ 1011-15 (1970)).

[85]15 U.S.C. § 1012(b) (1970).

[86]*Id.*

partial exemption from federal regulation is granted, however, because even if state laws regulate agreements to boycott, coerce or intimidate, the Sherman Act[87] still applies to such activities by insurance organizations.[88]

The McCarran-Ferguson Act exemption has been further interpreted as applicable only when the insurance company is engaged in the "business of insurance."[89] That activity is narrowly defined as the relationship between insurer and insured, questions surrounding interpretation and enforcement of insurance policies, and other activities of companies closely related to their reliability as insurers.[90] Courts also have held that a state law must specifically regulate the insurance relationship if the insurance company is to claim a McCarran-Ferguson Act exemption from federal regulation.[91] The degree to which restraints of trade will be permitted, in contravention of federal law, depends on the extent of state regulation and the unreasonableness of the restraint.[92]

Exemption of the industry from federal antitrust laws generated a great deal of criticism when the McCarran-Ferguson Act first became effective in 1945. State antitrust laws had not been

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[87] *Id.* §§ 1-7.

[88] *Id.* § 1013(b). In one interpretation, "the McCarran-Ferguson Act approves violations of federal antitrust laws so long as public regulation is provided." Comment, *Insurance Ratemaking Problems: Administrative Discretion, Investment Income, and Prepaid Expenses*, 16 WAYNE L. REV. 95, 100 (1969).

[89] SEC v. National Sec., Inc., 393 U.S. 453 (1969).

[90] *Id.*

[91] *Id.*; Hart v. Orion Ins. Co., 453 F.2d 1358 (10th Cir. 1971); Steingart v. Equitable Life Assurance Soc'y, 366 F. Supp. 790 (S.D.N.Y. 1973).

[92] The common law rule that only unreasonable restraints of trade violate the law has been adopted by the Sherman Act, 15 U.S.C. §§ 1-7 (1970). The types of conduct held to violate the Sherman Act per se include price-fixing agreements, group boycotts, agreements to divide markets, and tie-in sales. E. KINTNER, AN ANTITRUST PRIMER 21 (2d ed. 1973). Indiana's statutes, for example, broadened regulation of trade practices in the insurance business in accordance with the McCarran Act, adopting Sherman Act terms concerning contracts to restrain commerce and prohibit monopolistic restraints. Indiana Code section 27-4-1-4(4) includes in the definition of unfair and deceptive acts and practices in business,

> [e]ntering into any agreement to commit, or individually or by a concerted action committing any act of boycott, coercion or intimidation resulting or tending to result in unreasonable restraint of, or a monopoly in, the business of insurance.

IND. CODE § 27-4-1-4(4) (Burns 1975). The statute also condemns excessive or inadequate charges for policy premiums and unfair discrimination in premium rates between policyholders of the same class dealing with essentially the same hazards. *Id.* § 27-4-1-4(7)(c).

effectively enforced in the past,[93] and it was argued that the size and power of the nationally organized insurance industry presented "the same difficulties for state control as . . . national railroads and giant manufacturing organizations."[94] This bleak projection has some basis in fact 30 years after the passage of the McCarran-Ferguson Act. One recent study of the Act has criticized states for having "failed to use their regulatory power effectively or to investigate and curtail anticompetitive practices in the industry."[95]

Fears of monopolies and other antitrust activities have reappeared in recent months. The New York state legislature has formed a task force which in part will study antitrust implications in the simultaneous surfacing of the malpractice insurance crisis in many states across the country.[96]

As fewer insurance companies sell malpractice insurance, a lack of competition may aggravate monopolistic tendencies. One study estimates that only ten companies sell 90% of the policy coverage.[97] The continuing surge in group insurance, particularly through state or county medical societies, also explains problems of rising rates and withdrawal of coverage affecting whole or large portions of states.[98] The growing reluctance of companies to write policies for physicians in high risk classifications, except through group plans, forces those physicians to join medical societies. At the same time, high participation in the group plan

[93]C. EDWARDS, MAINTAINING COMPETITION—REQUISITES OF A GOVERNMENTAL POLICY 75 (1949).

[94]*Id.*

[95]Note, *Insurance Regulation and Antitrust Exemptions: McCarran-Ferguson, the Boycott Exception, and the Public Interest*, 27 RUTGERS L. REV. 140 n.2 (1973). Another study concluded that the existing administrative structure does not protect the public interest. Comment, *Insurance Ratemaking Problems: Administrative Discretion, Investment Income, and Prepaid Expenses*, 16 WAYNE L. REV. 85, 133 (1969). Even earlier, a 1960 Senate report concluded that state regulation of the insurance industry was deficient in enforcing capital and surplus requirements and in scrutinizing underwriting and reserve activities, and that state departments were ineffective in dealing with mergers and liquidations. Evidence also indicated lax supervision of statutes governing restraint of trade, monopoly, and unfair trade practices. SENATE COMM. ON THE JUDICIARY, THE INSURANCE INDUSTRY, S. REP. No. 1834, 86th Cong., 2d Sess. 237-47 (1960).

[96]Indianapolis News, May 30, 1975, at 3, col. 1.

[97]*Moves Afoot To Shore Up Sagging Malpractice Coverage*, 10 HOSP. PRAC. 24, 25 (1975).

[98]In 1970, an HEW study of the malpractice insurance market predicted:

> Within the foreseeable future, it is possible that group plans may so totally dominate the market that insurance carriers will cease selling policies to individual hospitals or practitioners.

HEW APPENDIX, *supra* note 34, at 494.

discourages writers of individual policies from entering the state.[99] Some "good risk" physicians who might be offered better insurance rates outside the group plan then find such policies unavailable.

Advantages to the insurance industry of physician group insurance plans include economies of scale in marketing and administration, risk spreading, and more reliable data on loss experience.[100] Although group plans might involve potential monopolistic tendencies, in that even slightly anticompetitive activities have a broader impact on malpractice insurance as fewer companies dominate larger market segments, the tendencies could be controlled by legislative action. Class action litigation would not be necessary if states regulate the insurance industry to protect the public against monopolistic activities and the resulting harmful practices.

C. The State Insurance Commissioner

Via their regulatory powers, states have created special departments to deal exclusively with the insurance business. The Department of Insurance in Indiana, for example, has charge of the "organization, supervision, regulation, examination, rehabilitation, liquidation, and/or conservation"[101] of insurance companies. If an insurance company conducts its business in an unlawful, unsafe or unauthorized manner, allows its capital or surplus funds to fall below a certain level, or fails or refuses to comply with any order, rule or regulation of the department, the insurance commissioner can direct correction of the problem by written order to the insurance company's board of directors.[102] If that effort fails, he may enjoin or compel the act.[103] Other powers of the Indiana insurance commissioner, which are representative of those granted by statutes in other states,[104] include authority to revoke a company's license to do business in the state,[105] to compel forfeitures,[106] to issue cease and desist orders,[107] and to seize company assets.[108] The regulation of rates is the prime consideration

[99] *Id.* at 514.

[100] *Id.* at 521.

[101] IND. CODE § 27-1-1-1 (Burns 1975).

[102] *Id.* § 27-1-3-19.

[103] *Id.*

[104] *E.g.*, CAL. INS. CODE § 1065.1 (1972); N.Y. INS. LAW § 127 (McKinney 1966).

[105] IND. CODE § 27-1-3-10 (Burns 1975).

[106] *Id.* § 27-4-1-12.

[107] *Id.* §§ 27-4-1-6 to -9, & -12.

[108] *Id.* §§ 27-1-4-1 & -4. *See* Pfennigstorf, *The Enforcement of Insurance Laws*, 1969 WIS. L. REV. 1026, 1032-67 (discussion of insurance commissioners' powers).

here, and the Indiana law, in language typical of statutes in other states, proposes to

> promote the public welfare by empowering the commissioner of insurance to regulate insurance rates to the end that they shall not be excessive, inadequate, or unfairly discriminatory, and to encourage reasonable competition among insurance companies . . . and to permit and regulate, but not require, cooperative action among insurers, as to rates, rating systems, rating plans and practices . . . .[109]

As in other states,[110] insurers in Indiana must either file rating schedules or plans with the commissioner or belong to a licensed rating organization that does.[111] The commissioner is empowered to make any rules and regulations he deems necessary to exercise his enumerated powers.[112]

There is some question as to whether insurance commissioners are using their powers effectively to regulate industry activity. Problems generated by group insurance programs, for instance, could be limited if insurance commissioners adopt plans providing six months of insurance coverage in the event of the carrier's bankruptcy,[113] requiring substantial advance notice of cancellation,[114] and allowing public hearings for physicians denied coverage by the group.[115] Although state insurance commissioners cannot absolutely compel the issuance of medical malpractice policies,[116] commissioners apparently can condition the sale of other types of insurance on assumption of part of the malpractice busi-

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[109] IND. CODE § 27-1-22-1 (Burns 1975).

[110] *See* Donovan, *Regulation of Insurance Under the McCarran Act*, 15 LAW & CONTEMP. PROB. 473, 485-86 (1950).

[111] IND. CODE § 27-1-22-4 (Burns 1975).

[112] *Id.* § 27-1-3-7.

[113] HEW APPENDIX, *supra* note 34, at 553. *See* IND. CODE §§ 27-6-8-2 to -18 (Burns 1975) (dealing with the contingency of a company's bankruptcy).

[114] HEW APPENDIX, *supra* note 34, at 553.

[115] *Id.* at 555.

[116] In St. Paul Fire & Marine Ins. Co. v. Insurance Comm'r, 339 A.2d 291 (Md. Ct. App. 1975), the Maryland Court of Appeals struck down an attempt by the insurance commissioner to order St. Paul Fire & Marine Insurance Company to continue writing insurance for its physician-policyholders. The court held that the insurer's withdrawal from the malpractice field was not prevented by a Maryland statute, MD. ANN. CODE art. 48A, § 234A (1972), providing that an insurer could not cancel or refuse to underwrite a particular insurance risk for arbitrary, capricious or unfairly discriminatory reasons. *See also* Curran, *The Malpractice Insurance Crisis*, 293 NEW ENG. J. MED. 24 (1975).

ness.[117] They may require supporting data from insurance companies proposing premium rate increases and refuse to permit unjustified rates. That commissioners often have not done so in the past[118] is further reason to encourage new exercise of their powers.

In numerous ways, insurance commissioners could take an active role in insurance supervision. Recently the Texas legislature gave the state insurance board control over medical liability rates,[119] an extension of the power of most commissioners to review and approve but not fix rates.[120] The board immediately exercised that control by freezing premium rates.[121] In another illustration of the potentialities, the Pennsylvania insurance commissioner settled a suit by the state medical society against Argonaut Insurance Company. The commissioner approved a 206% rate increase for Argonaut but added provisos that the company underwrite the state's physicians for four years and that premiums be justified by claims experience.[122] In the past, insurance commissioners have shied away from mandating insurance company efforts to solve the malpractice insurance crisis, relying instead on state legislative actions. Conceivably, within their broadly enumerated powers, commissioners could find authority for requiring companies authorized by law to sell all types of liability insurance to set up an assigned risk pool to cover all physicians who otherwise could not obtain insurance.[123] Such a plan would be analogous to automobile liability assigned risk programs for drivers who cannot find insurance in the free market. Alternatively, states could legislate on an emergency basis that any insurance company withdrawing from the malpractice business would be barred from writing other insurance business in the state. The danger, however, of attempting to force insurers to cover malpractice risks is that companies will opt to leave the state rather than risk subjecting their businesses to what they view as imminent financial distress. On the positive side, a broad and equitable apportionment of risks among insurers might prove economically reasonable, if not necessarily profit-generating.

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[117]JUAs have not yet been attacked on constitutional grounds. Curran, *supra* note 116, at 24.

[118]States are criticized for not exercising "their police powers in impounding for careful expert scrutiny the purported losses and requests for rate increases of any professional liability insurance company . . . ." Gibbs, *supra* note 12, at 32.

[119]TEX. INS. CODE art. 5.82 (Cum. Supp. 1975-76).

[120]*E.g.*, N.Y. INS. LAW § 184 (McKinney 1966).

[121]American Medical News, Aug. 4, 1975, at 10, col. 1.

[122]MED. WORLD NEWS, July 14, 1975, at 23.

[123]121 CONG. REC. 306 (1975) (remarks of Senator Nelson).

An insurance commissioner's powers, therefore, are presently more preventive and punitive than affirmative. If a state legislature were to provide the commissioner with express statutory authority to initiate programs and rules regarding malpractice insurance, however, he would feel supported in taking more positive actions to regulate insurers.

D. New State Legislation

In the first half of 1975, most states either passed emergency bills which dealt with malpractice insurance availability, or established a commission to study the problem.[124] Such legislation was generally directed towards the stabilization of insurance premiums and the attraction of malpractice insurers into a state. Whether these acts will eliminate the dangers of monopoly, deceptive ratemaking, and coercive activity by insurance companies remains to be seen. Noteworthy changes in the new acts include restrictions on statutes of limitations, often eliminating the rule that the statute does not begin to run until discovery of an injury, dollar "caps" on total recoveries available to injured plaintiffs, and arbitration panels.[125] Certainly, all of those changes meet insurance industry suggestions to ease ratemaking problems in that the "long tail" on claims is replaced by a set time period within which claims must be brought, clear limits on insured physicians' liability eliminate guesswork as to inflation of future awards, and arbitration panels can save defense expenses and settle "nuisance value" cases.[126]

One point that cannot be ignored in reviewing the new legislation is that insurance companies made no commitments to main-

[124]Curran, *Malpractice Crisis: The Flood of Legislation*, 293 NEW ENG. J. MED. 1182 (1975).

[125]MED. WORLD NEWS, July 28, 1975, at 80 (chart of malpractice laws by state as of mid-July 1975). The Indiana act, IND. CODE §§ 16-9.5-1-1 to -9-10 (Burns Supp. 1975), provides for the following: A two year statute of limitations running from the date of the occurrence, *id.* §§ 16-9.5-3-1, -2; a $100,000 limit on physician-insurer liability, *id.* § 16-9.5-2-2(b), with an excess insurance fund covering liability up to the maximum recoverable of $500,000, *id.* § 16-9.5-2-2(a); and arbitration, in the form of a mandatory, nonbinding screening panel, preliminary to court suit, *id.* §§ 16-9.5-9-1 to -10. Several states have statutes similar to Indiana's. *See* ch. 75-9, §§ 1-17, [1975] Laws of Fla. 13 (to be codified in scattered sections of FLA. STAT.); ch. 796, §§ 1-27, [1975] Ore. Laws 2306 (to be codified in scattered sections of ORE. REV. STAT.); Act of Aug. 4, 1975, No. 817, §§ 1-3, [1975] LA. SESS. LAW SERV. No. 4, at 1382 (West 1975), *to be codified as* LA. REV. STAT. §§ 40:1299.41-.47.

[126]Indisputably, physicians gain tremendous advantages from having their liability limited by time and amount and reviewed prior to trial or settlement. On the other hand, there are obvious disadvantages to plaintiff-patients and questions as to the constitutionality of limiting redress for injury resulting from malpractice.

tain reasonable premium rates and no guarantees to insure physicians in high risk classes.[127] The Indiana medical malpractice law,[128] as one example, offers unique solutions to the malpractice insurance problem, but the law's inherent weakness lies in the absence of means to enforce the continued availability of insurance.[129] Therefore, other facets of the the new laws attract particular interest as they affect the insurance domain: joint underwriting associations or risk pools, malpractice insurance funds, and physicians' self-insurance companies.[130]

The National Association of Insurance Commissioners urged authorization of joint underwriting associations (JUAs), or mandatory risk-sharing pools, as a temporary solution to the problem of unavailability of insurance.[131] Several state legislatures followed the advice.[132] A typical JUA plan requires all companies writing personal liability insurance in a state to participate in the malpractice insurance business.[133] Most laws provide for the plan to be temporary or operational at the insurance commissioner's option.[134] JUAs provide primary coverage for physicians or reinsurance of policy liability over a certain amount. They might cover only those physicians otherwise unable to obtain insurance

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[127]One reason for the reluctance of insurers to speak to the issue of rates might be that the Indiana act is not retroactively effective; section 7 of chapter 1 explicitly excludes application to any act of malpractice occurring before July 1, 1975. IND. CODE § 16-9.5-1-7 (Burns Supp. 1975).

[128]*Id.* §§ 16-9.5-1-1 to -9-10.

[129]*Id.* § 16-9.5-7-1.

[130]By mid-July 1975, there were at least seven states establishing joint underwriting associations by new laws. Ch. 75-9, § 2, [1975] Laws of Fla. 15, *to be codified as* FLA. STAT. § 627.352; IDAHO CODE §§ 41-4101 to -4114 (Cum. Supp. 1975); Act of Sept. 12, 1975, Pub. Act 79-962, [1975] ILL. LEGIS. SERV. No. 6, at 1619-26 (West 1975), *to be codified as* ILL. REV. STAT. ch. 73, §§ 1065.201-.221; MD. ANN. CODE art. 48A, §§ 504-18 (Cum. Supp. 1975); ch. 296, [1975] Nev. Sess. Laws 398-400 (Nevada Essential Insurance Association); WIS. STAT. ANN. § 619.01 (Spec. Pamphlet 1975).

At least two states established physician-supported insurance funds. IND. CODE §§ 16-9.5-4-1 to -3 (Burns Supp. 1975); Act of May 12, 1975, Pub. Act 43, [1975] MICH. LEGIS. SERV. No. 1, at 89-94 (West 1975), *to be codified as* MICH. COMP. LAWS §§ 500.2500-.2517.

Five states authorized the formation of physicians' self-insurance companies. MD. ANN. CODE art. 48, §§ 548-65 (Cum. Supp. 1975); MO. REV. STAT. §§ 383.010-.040 (Vernon Cum. Supp. 1976); N.Y. INS. LAW §§ 681-95 (McKinney Supp. 1975-76); N.D. CENT. CODE §§ 26-40-01 to -15 (Supp. 1975); ch. 796, § 12, [1975] Ore. Laws 2313-14, *to be codified as* ORE. REV. STAT. § 731-504.

[131]MED. WORLD NEWS, July 28, 1975, at 76. The American Insurance Association also supported JUAs. *Id.*, Mar. 25, 1975, at 25.

[132]*Id.*, July 28, 1975, at 80.

[133]*E.g.*, IDAHO CODE § 41-4103(1) (Cum. Supp. 1975).

[134]*E.g.*, *id.* § 41-4103(3).

or they may be the exclusive writers of malpractice policies. Reserve funds for such plans are accumulated either from surcharges on JUA policies or assessments of all state physicians, according to the scope of the program.

A second approach involves malpractice insurance fund plans such as those in Indiana[135] and Michigan.[136] These plans, which also offer insurance for physicians who cannot purchase protection elsewhere, are supported by premiums and assessments on physicians. They are administered by a risk manager under the authority of the department of insurance, rather than by an organization of all liability insurance companies. A third innovation is exemplified by Maryland's plan,[137] which authorizes a $300 tax charge on every doctor in the state for creation of a physicians' mutual liability company to handle medical malpractice insurance.[138] Any licensed physician may become a member upon payment of the tax.[139] The company will be governed by an eleven-member board, of which not more than five may be physicians.[140]

The main criticism that can be directed at these three programs is that, while they have dealt with the present availability of insurance, they do not guarantee reasonable rates. In fact, all require surcharges or special reserve fund charges in addition to regular premiums.[141]

Compromises form the basis of this body of legislation—compromises on the part of physicians, on the part of insurance companies, and on the part of insurance commissioners. Given the uniqueness of the predicament, no one can postulate with certainty the correctness of any one solution. Possibly, a combination of proposals addressed to the ratesetting and availability aspects of the malpractice insurance dilemma might be implemented without much difficulty.

V. A Proposal

Notwithstanding the wealth of no-fault proposals,[142] arbitra-

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[135]Ind. Code §§ 16-9.5-1-1 to -9-10 (Burns Supp. 1975).

[136]Mich. Comp. Laws Ann. §§ 500.2500-.2517 (West Supp. 1975).

[137]Md. Ann. Code art. 48A, §§ 548-56 (Cum. Supp. 1975).

[138]*Id.* § 552(b).

[139]*Id.* § 552(e).

[140]The physician members of the company will elect the board. *Id.* § 551.

[141]American Medical News, Aug. 4, 1975, at 10, col. 1. In the case of the Maryland physicians' self-insurance company, rates are expected to increase 100%. *Id.*

[142]*See, e.g.*, Carlson, *Conceptualization of a No-Fault Compensation System for Medical Injuries*, 7 Law & Soc. Rev. 329 (1973); Havighurst & Tancredi, *"Medical Adversity Insurance"—A No-Fault Approach to Medical Malpractice and Quality Assurance*, 1974 Ins. L.J. 69; Keeton, *Compensa-*

tion plans,[143] and federal insurance bills,[144] a system combining several other proposals might alleviate the need for drastic revisions in the present manner of dealing with medical malpractice cases. The traditional system requiring a determination of negligence in order to hold a physician liable for damages could be preserved, and responsibility for insurance supervision could remain with state governments. A data collection system for rate-making, adoption of claims-made policies, creation of physicians' self-insurance companies, and government-sponsored reinsurance comprise the four elements of this proposal.

The first requirement, a data collection system for malpractice insurance statistics, would be supervised and utilized by insurance commissioners to compare rates and rating practices among companies.[145] Commissioners could then determine the extent of insurance availability and the reasonableness of rates without resort to medical society or insurance industry statistics. Companies could forecast losses and set rates more accurately than in the past with the aid of accurate data. In particular, newly-established physicians' companies would have at hand the factual information that has previously eluded insurers to ease their financial stabilization in the insurance business. Insurance commissioners could apply appropriate pressures to keep companies in line with rates and penalize rate deviations or attempts to manipulate the market. However, those profit-oriented tendencies would be anticipated only to a limited degree with physicians' self-insurance companies, whose major concern would be coverage.

The next suggested action is more drastic: adoption of claims-made insurance policies in place of the occurrence policies now commonly offered. This step would eliminate the difficulties accompanying the current situation of having an indefinite number of claims incurred but not yet reported. In a claims-made policy, the insurer agrees to assume liability for acts of malpractice occurring during the policy term only to the extent that a claim is

tion for Medical Accidents, 121 U. PA. L. REV. 590 (1973); O'Connell, *No-Fault Insurance for Injuries Arising From Medical Treatment: A Proposal for Elective Coverage*, 24 EMORY L.J. 21 (1975).

[143] *See, e.g.*, S. 482, 94th Cong., 1st Sess. (1975). This legislation is entitled the National Medical Insurance and Arbitration Act. It would make federal insurance available only to states with programs for initial arbitration of malpractice claims. The bill sets forth procedures for initiation of arbitration, appointment of the arbitration panel, hearing procedures, law governing the panel's decision, and proceedings subsequent to the panel's decision.

[144] *See, e.g.*, S. 482, 94th Cong., 1st Sess. (1975); S. 215, 94th Cong., 1st Sess. (1975).

[145] *See* HEW REPORT, *supra* note 18, at 38 (stressing the need for such a reporting system).

made within the policy period.[146] Coverage under an occurrence policy, on the other hand, extends to any acts of malpractice occurring during the policy period, regardless of when claims are made.[147] Since an insurer's retrospective and prospective liability are limited under the claims-made policy, he can predict losses, determine rates, and set aside reserves with a higher degree of accuracy.

Physicians have voiced strong objections to claims-made policies, largely because the physicians would be forced to purchase coverage even after they discontinued practicing in order to be protected.[148] Since the policy only covers claims or suits brought in the specific period of the policy, a retired physician would still need an insurance policy in case a patient brought a claim within the statute of limitations but after the physician's last year of practice. That expense must be weighed against the elimination of inflated premium charges, and presumably the premium could be reduced each year as the possibility of a claim declined. One final charge could cover all remaining exposure to liability after a predetermined period.[149] Alternatively, state insurance departments could form risk pools for coverage of retired physicians or the estates of deceased physicians.[150] Claims-made policies are also criticized for offering no more than a short-term reduction in malpractice insurance costs if other malpractice litigation expenses continue to rise. Nevertheless, coverage at a reasonably calculated though increasing rate could be assured, and at least one company actively championing the claims-made concept predicts a lowered rate.[151] Another argument insists that there is no need for claims-made policies following passage of statutes, such as Indiana's, which reduce statutes of limitation to two or three years[152] and strictly limit recoverable damages.[153] In response to that point, a caveat applies. If those statutes do not operate retro-

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[146]Comment, *The "Claims Made" Dilemma in Professional Liability Insurance*, 22 U.C.L.A.L. Rev. 925 (1975).

[147]*Id.*

[148]Lanzone, *Products Liability and Professional Liability No-Fault: A Defense Lawyer's View*, 47 N.Y. St. B.J. 185, 216 (1975).

[149]St. Paul's claims-made plan offers "reporting" coverage for retired physicians or deceased physicians' estates in a three-year installment plan. Med. World News, July 14, 1975, at 78.

[150]Lanzone, *supra* note 148, at 216.

[151]St. Paul plans a five-year premium rate increase per physician, with the coverage "maturing" in the fifth year, and predicts that the mature claims-made rate will be less than the occurrence rate would be at that time. Med. World News, July 14, 1975, at 78.

[152]Ind. Code § 16-9.5-3-1 (Burns Supp. 1975).

[153]*Id.* § 16-9.5-2-2.

actively, as Indiana's does not,[154] acts of malpractice occurring prior to the effective date of the statute are not covered. In those cases, the previous laws allowing open-ended awards and extended statutes of limitation would apply. Thus, insurers would need the definite terms available in claims-made policies.

Claims-made policies have aroused controversy wherever insurance companies have attempted to obtain approval of them; Indiana, among other states, has not been receptive.[155] Although new to medical malpractice insurance, claims-made provisions have increasingly been used by insurers of architects, engineers, lawyers, brokers, and accountants,[156] and the validity of those professional liability insurance contracts has been litigated.[157] The benefits of such policies have been well recognized. In thirty-one of the forty-four states in which St. Paul Fire & Marine Insurance Company filed requests for claims-made policies, the requests have been approved.[158] The approach of the California legislature seems the most reasonable. A 1975 statute[159] permits claims-made policies to be issued, subject to the conditions that the fact that coverage is limited to liability for claims made against the in-

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[154]*Id.* § 16-9.5-1-7.

[155]Interview with Lawrence G. Kaseff, Deputy Commissioner, Patients Compensation Authority, Indiana Department of Insurance, in Indianapolis, Ind., August 29, 1975. Mr. Kaseff confirmed the fact that the Indiana insurance commissioner had rejected the claim-made policy form submitted by St. Paul and predicted that the commissioner would not approve the forms in the future.

[156]Comment, *The "Claims-Made" Dilemma in Professional Liability Insurance*, 22 U.C.L.A.L. REV. 925, 926 (1975).

[157]For examples of courts striking down claims-made policies, see J.G. Link & Co. v. Continental Cas. Co., 470 F.2d 1133 (9th Cir. 1972), *cert. denied*, 414 U.S. 829 (1973) (ambiguous claims-made provision in architect's policy construed in favor of insured); Gyler v. Mission Ins. Co., 10 Cal. 3d 216, 514 P.2d 1219, 110 Cal. Rptr. 139 (1973) (attorney's claims-made policy held ambiguous); Jones v. Continental Cas. Co., 123 N.J. Super. 353, 303 A.2d 91 (Ch. 1973) (professional engineer claims-made policy held invalid as contrary to public policy in limiting coverage). Cases in which courts upheld claims-made policies include Cornell, Howland, Hayes & Merryfield, Inc. v. Continental Cas. Co., 465 F.2d 22 (9th Cir. 1972) (court relied on plain language of policy to deny recovery to engineer-policyholders); Livingston Parish School Bd. v. Firemen's Fund Am. Ins. Co., 282 So. 2d 478 (La. 1973) (engineer's claim to reasonable expectations of coverage held defeated by unambiguous provisions clearly limiting protection); J.M. Brown Constr. Co. v. D & M Mechanical Contractors, Inc., 222 So .2d 93 (La. Ct. App. 1969) (court found forthright statement on face of broker's policy as to coverage was clear).

[158]American Medical News, July 21, 1975, at 10, col. 2.

[159]CAL. INS. CODE § 11580.01 (West Supp. 1975).

sured while the policy is in force be conspicuously recited on the application and on the front page of the policy.[160]

Approval of claims-made policies by state insurance commissioners would facilitate implementation of the next step in this suggested plan, which is establishment of physician-owned insurance companies. The idea has been tried and found workable. For example, in 1957 a group of Colorado physicians reduced their insurance costs by forming their own insurance company, Empire Casualty Company,[161] and in 1971 the entirely doctor-owned and doctor-run company insured 55% of the private physicians in the state.[162] The financial uncertainties which plague self-insurance companies as well as other insurers would be minimized by the first two steps of this plan since companies could begin operations with a surer footing in ratemaking and investment planning. The obvious advantages to physicians and to general liability insurers of having physicians develop their own companies range from lifting a financial burden from the established general insurers to providing an opportunity for the specialized company to develop expertise in malpractice insurance writing and defense. General liability insurers would no longer feel pressured to compensate for malpractice insurance losses by raising rates of other insurance lines, and the cooperative companies could concern themselves more with coverage than with profitmaking.

In setting up an insurance business, two hurdles are raising the initial capital required by state law to prove financial solvency and obtaining reinsurance. Assessments of all medical society members and initial surcharges of insured physicians can be used to build capital and reserves. Physician-owned insurance companies in New York, Maryland, Michigan, and Northern California are presently implementing those procedures.[163] Under most state laws, companies must restrict their coverage to some percentage of their reserves if they do not have reinsurance.[164] This critical requirement could be met either by a state-operated JUA which would function exclusively for the purpose of offering reinsurance to physician-owned companies, or by a federal re-

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[160]See Comment, *The "Claims-Made" Dilemma in Professional Liability Insurance*, 22 U.C.L.A.L. REV. 925 (1975), for a critical study of the validity of claims-made policies, concluding with an endorsement of the California statute. See Trout, *Malpractice Insurance: Claims-Made Policies Pose a New Dilemma*, 3 J. LEGAL MED. 33 (1975), for a similar analysis.

[161]Tucker, *New Answer to High Malpractice Rates*, 35 MED. ECON. 71 (1958).

[162]*Malpractice Insurance Outlook: Brightening*, 48 MED. ECON. 103, 104 (1971).

[163]*See* American Medical News, July 28, 1975, at 1, col. 2.

[164]*See, e.g.*, IND. CODE § 27-1-13-6 (Burns 1975).

insurance program. Under one proposed federal program, companies could make payments into a federal reinsurance fund, which would cover all payments beyond the first $25,000 of each claim.[165] Under acts such as Indiana's,[166] which limit recovery amounts for malpractice injuries, the need for reinsurance would diminish as fewer suits are brought under past laws.

By incorporating these four steps into one system, states could continue their regulation of the insurance industry with limited federal interference. Within carefully delineated bounds, a private insurance system could operate efficiently and competitively.

VI. Summary

Maintenance of insurance availability at reasonable rates will not solve the malpractice problem, nor is it intended to do so. As long as physicians commit acts of malpractice and are held liable for resulting injuries, however, medical malpractice insurance will remain a necessity. This Note approaches the malpractice crisis from the viewpoint of insurance, showing the need for professional liability insurance under the existing system of laws and examining the causes and effects of the malpractice insurance crisis. Various economic factors stimulated drastic and far-reaching responses from insurance companies regarding malpractice insurance. Unfortunately, many state insurance departments did not react so quickly. What this Note has attempted to demonstrate is that state governments have been deemed the appropriate entities to control the business of insurance and that states have an obligation to fulfill that role. Insurance companies, in turn, have a responsibility to the public and should exercise that duty in the course of business.

New state laws clarify these powers and responsibilities; nevertheless changes in attitudes, as well as laws, are needed. The proposal set forth in this Note does not demand a major overhaul of approaches to malpractice insurance, but in essence the proposal does require that insurance commissioners exercise long dormant powers and actively police the industry. The crisis in malpractice insurance availability warrants affirmative efforts by physicians, insurers, and insurance departments to assure continued coverage at reasonable rates.

Heather M. Wiske

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[165]S. 188, 94th Cong., 1st Sess. (1975), entitled the Federal Medical Malpractice Insurance Act. Requirements of arbitration and uniform rates as they appeared in that bill would not be endorsed as necessary to this proposed solution. *See also* H.R. 2804, 94th Cong., 1st Sess. (1975).

[166]Ind. Code §§ 16-9.5-1-1 to -9-10 (Burns Supp. 1975).

Keller, Prosecutorial Discovery and the Privilege Against Self-Incrimination

On October 15, 1974, the Indiana Supreme Court decided *State ex rel. Keller v. Criminal Court.*[1] This case greatly enhanced the extent to which an Indiana trial court may order prosecutorial discovery. Apparently, the court accepted the American Bar Association's guiding maxim that criminal discovery should be "as full and free as possible."[2] However, the discovery rules promulgated in *Keller* go beyond the now approved ABA Standards. Likewise, the *Keller* rules are freer and fuller than the newly revised and recently enacted Federal Rules of Criminal Procedure.[3] This Note will survey the changes in Indiana law endorsed by *Keller*, analyze the arguments used by the majority in justifying the *Keller* decision, examine the traditional arguments for prosecutorial discovery, and, finally, discuss the relationship between the accused's privilege against self-incrimination and liberal prosecutorial discovery.

I. Significance and Impact of *Keller* on Prosecutorial Discovery

The importance of *Keller* is threefold. Primarily, *Keller* emphasized that the right to discovery shall be balanced between the parties.[4] This doctrine of balanced discovery is referred to in the opinion as "reciprocity." Chief Justice Arterburn, writing for the majority, stated that the accused will have the "ultimate choice of whether to risk self-incrimination."[5] Similarly, Justice DeBruler, dissenting, interpreted "reciprocity" to mean that the accused may have discovery only if he is willing to permit disclosure to the state.[6] For the purposes of this Note, Justices DeBruler's interpretation of reciprocity will be labelled "conditional discovery"

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[1]317 N.E.2d 433 (Ind. 1974).

[2]ABA Standards Relating To Discovery and Procedure Before Trial § 1.2 (Approved Draft, 1970) [hereinafter cited as ABA Standards]. The approved draft contains the tentative draft and the supplement to the tentative draft. Parentheticals will be used to refer to the language of the supplement when language contained therein differs from the language of the tentative draft.

[3]Fed. R. Crim. P. 16.

[4]317 N.E.2d at 438.

[5]*Id.*

[6]*Id.* at 443. Justice DeBruler feared that where the accused decides not to seek discovery, the case will be tried under procedural rules existing prior to Bernard v. State, 248 Ind. 688, 230 N.E.2d 536 (1967). In other words, the case would proceed without reliance upon discovery.

since the accused's rights to discovery are conditioned on his willingness to permit equal privileges to the state. Conditional discovery gives the impression of satisfying the requirements of the fifth amendment so as to preclude an attack on the ground that the accused's privilege against self-incrimination has been violated. The majority in *Keller* reasoned that the privilege is violated only when the accused is *compelled* to incriminate himself. Therefore, if the accused is held to waive his objection voluntarily by requesting discovery, the privilege is not contravened.[7]

However, when one recognizes that the Indiana judiciary in the past seven years has granted the criminal defendant rights to discover certain information within the possession of the state, independent of any right of the state to discovery, conditional discovery becomes restrictive and a deprivation of defense discovery. In upholding conditional discovery, the ground gained by an accused in Indiana has been effectively eliminated. If the accused chooses to assert his constitutional right not to incriminate himself, he will be forced to forfeit his right to request discovery from the state as was permitted him by *Bernard v. State,*[8] *Antrobus v. State,*[9] *Dillard v. State,*[10] *Sexton v. State,*[11] and other Indiana Supreme Court cases decided within the past seven years. The dilemma denies the accused formal pretrial discovery and exposes him to the extraordinary investigatory resources of the state. The ABA Advisory Committee on Pretrial Procedure acknowledged the innate deprivation of conditional discovery: "Indeed, there is considerable doubt whether, in practice, the imposition of a condition will accomplish anything but a denial of disclosures to the accused."[12]

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[7]317 N.E.2d at 438.

[8]248 Ind. 688, 230 N.E.2d 536 (1967). *Bernard* held that where a list of witnesses is requested by the defendant, it should be granted unless the state makes a showing of a paramount interest over that of the defendant.

[9]253 Ind. 420, 254 N.E.2d 873 (1970). A defendant can obtain production of a prosecution witness' pretrial statements to the police or grand jury when: (1) the witness whose statement is sought has testified on direct examination; (2) a substantially verbatim transcript of the statement is shown to probably be within control of the prosecution; and (3) the statement relates to matters covered in the witness' testimony.

[10]257 Ind. 282, 274 N.E.2d 387 (1971). A defendant can obtain pretrial discovery if he specifically designates the items sought, if he shows that the items are material to his defense, and if the state has not made a showing of a paramount interest in nondisclosure. The "materiality" and "specificity" requirements have been liberally construed.

[11]257 Ind. 556, 276 N.E.2d 836 (1972). Applying the same requirements as *Dillard,* the *Sexton* court held that it was error for the trial court to deny the defendant's motion for pretrial discovery of his written pretrial statement to the police and a diagram made by the police of the scene of the killing.

[12]ABA STANDARDS § 1.2, at 45.

On the other hand, "reciprocity" may mean something other than conditional discovery. *Keller* defined "reciprocity" as "the balancing of the *right* to discovery on both sides."[13] This suggests that both the state and the accused have an equal right to discovery. Yet, the right cannot be equal unless both parties are permitted to request discovery independent of any conditions. This system of the right to discovery will be referred to as "independent discovery." Independent discovery has been endorsed by the ABA Standards[14] and the Federal Rules of Criminal Procedure,[15] which were cited by the *Keller* majority as supportive of its stand on broad pretrial discovery.[16] Independent discovery has the effect of preserving the accused's right to request pretrial discovery as well as any objection he may later assert that certain information required to be disclosed to the state is violative of his fifth amendment privilege against self-incrimination. In short, the accused is not required to forfeit one right in order to exercise the other. Also, independent discovery allows the state to request pretrial disclosures without regard to whether the accused requests discovery.

"Reciprocity" as used in *Keller* is an ambiguous concept. Whether it was intended to mean "conditional" or "independent" discovery will be a matter for judicial interpretation. This Note will proceed on the assumption that the defendant chooses to seek discovery.

Keller is also significant because of the broad degree of prosecutorial discovery that is sanctioned, thus catapulting Indiana to the forefront in the area of prosecutorial discovery. Prior to *Keller*, the state possessed only a few means of securing formal pretrial discovery.[17] It remains to be seen whether, in the face of constitutional safeguards of the accused, the sudden and extreme change of doctrine can be justified.

The third significance of *Keller* concerns the discretion of the trial court when ordering pretrial discovery. Did the majority set out guidelines to be followed by the lower courts when confronted with the question of pretrial discovery? Or, did *Keller* simply affirm the discovery order in issue? *Keller* held that as a matter of law "a trial court has the inherent power to balance discovery privileges between parties."[18] To that end, the *Keller* opinion includes specific material which is approved as suitable for dis-

[13]317 N.E.2d at 438 (emphasis added).

[14]ABA STANDARDS § 1.2, at 45.

[15]FED. R. CRIM. P. 16 (notes of the Advisory Committee on Rules).

[16]317 N.E.2d at 436.

[17]Hollars v. State, 259 Ind. 229, 286 N.E.2d 166 (1972); Paschall v. State, 152 Ind. App. 408, 283 N.E.2d 801 (1972); IND. CODE § 35-5-1-1 (Burns 1975); *id.* § 35-5-2-1; *id.* § 35-1-38-8.

[18]317 N.E.2d at 438.

covery and will serve to guide the trial courts in Indiana.[19] The opinion not only sanctioned the reciprocity concept, but also the rules prescribing the scope of prosecutorial discovery which were ordered by the lower court. The rules were specifically enumerated and will undoubtedly influence the trial courts.

Now that the terrain of prosecutorial discovery has been mapped by the Indiana Supreme Court, how much actual discretion is left to the trial courts? The question of the accused's fifth amendment privilege against self-incrimination was summarily dismissed by the supreme court. As a result, objections based upon a violation of the privilege, except in cases where the state's request is flagrantly unconstitutional, would be to no avail. In effect, the trial courts are preempted from hearing and considering a defendant's contention of self-incrimination. Indeed, the rules prescribed in *Keller* suggest that when the motion for discovery has been made by the state and the motion is within the purview of the rule, the lower court *shall* order discovery.[20] Therefore, the only appreciable degree of discretion remaining with the trial courts when asked to order prosecutorial discovery is whether a defendant has been afforded the same scope of discovery. Although it is clear that the trial courts have the inherent power to order balanced discovery, it is questionable whether the trial courts now have, in a practical sense, the inherent power to refuse discovery to the state once a proper motion has been made.

II. Prosecutorial Discovery: Before and After *Keller*

Unlike defense discovery, extensive pretrial prosecutorial discovery did not exist prior to *Keller*. The state was afforded few formal means of discovery. A small number of state statutes and a handful of "parrot" cases following the examples set by the United States Supreme Court in the area of physical identification evidence[21] provided the state with formal discovery devices. These statutes require the defendant who intends to plead alibi[22] or insanity[23] at trial to inform the prosecution of the de-

[19] *Id.* at 435-36.

[20] *Id.* at 436.

[21] Hollars v. State, 259 Ind. 229, 286 N.E.2d 166 (1972); Paschall v. State, 152 Ind. App. 408, 283 N.E.2d 801 (1972).

[22] Ind. Code § 35-5-1-1 (Burns 1975). A defendant in a criminal case shall notify the prosecution in writing of his intention to offer into evidence his defense of alibi not less than 10 days prior to trial. The notice shall include specific information as to the exact place that the defendant claims to have been at the time of the offense.

[23] *Id.* § 35-5-2-1. When a defendant desires to plead insanity at the time of the offense, he must set out his defense specifically in writing.

fense within a reasonable time before trial. Another statute provides that if the defendant is permitted to take depositions, the state may also take them.[24] In two 1972 decisions, the Indiana courts held that the state could take samples of a defendant's handwriting[25] or his fingerprints.[26] The court reasoned that this evidence was not testimonial and, therefore, not violative of a defendant's privilege against self-incrimination. In 1973, the court held that the defendant can be required to appear in a lineup and give voice exemplars.[27]

In addition to the formal discovery rights previously allowed the state, the *Keller* decision permits the state to discover any physical or mental examinations or other reports of experts that the defense counsel has in his possession or control.[28] However, if the defense does not intend to use any portion of certain reports at trial, the defendant's statements included in such reports may be withheld from the prosecution's discovery.

Keller also allows the state to discover any defenses which the defense counsel intends to use at trial.[29] In conjunction with the defenses, the defendant must inform the state of the names and addresses of prospective witnesses, together with their relevant statements. Finally, the state can learn of any tangible evidence intended to be introduced at trial.[30]

III. A Comparison: Federal Rules and ABA Standards

Aside from any constitutional arguments that may exist, how do the *Keller* rules on prosecutorial discovery compare with other accepted standards of discovery? The *American Bar Association Standards Relating to Discovery and Procedure Before Trial* and the new Federal Rules of Criminal Procedure will serve as models for comparison.

Neither the ABA Standards nor the federal rules go so far in the area of medical and scientific reports as does *Keller*. *Keller*

[24]*Id.* § 35-1-31-8. When a defendant takes depositions of witnesses to be read at trial, the prosecution has the reciprocal right to depose witnesses, relevant to the same matter.

[25]Hollars v. State, 259 Ind. 229, 286 N.E.2d 166 (1972). In a forgery case, the defendant was compelled to undergo handwriting tests.

[26]Paschall v. State, 152 Ind. App. 408, 283 N.E.2d 801 (1972). In a first degree burglary case, the defendant was forced to submit to fingerprinting.

[27]Stephens v. State, 260 Ind. 326, 330, 295 N.E.2d 622, 624-25 (1973). The defendant was convicted of robbery and kidnapping. On appeal, he contended that he was prejudiced when he was forced to speak at a police lineup. The court held that requiring an accused to state his name and address is permissible.

[28]317 N.E.2d at 436.

[29]*Id.*

[30]*Id.*

suggests that, absent a strong interest in nondisclosure, the prosecution must be permitted to discover all reports in the possession of the defense and testimony relating to the reports.[31] The ABA Standards leave such a potentially harmful device in the sound discretion of the court.[32] Moreover, *Keller* permits state discovery of defense reports when the defense does not intend to introduce them into evidence. Both the ABA Standards[33] and the federal rules[34] restrict discovery to those reports intended to be introduced into evidence at trial.

Also, both the ABA Standards[35] and the federal rules[36] restrict state discovery of medical and scientific reports to reports or statements made in connection with the particular case. *Keller* includes no such limitation. Additionally, *Keller* permits discovery of any testimony relative to the medical reports. The ABA Standards do not directly address this problem. However, the federal rules do not permit the state to discover expert testimony, but rather permit the state to discover only the reports which relate to the expected testimony.[37]

As to defenses, the *Keller* rules require the defense counsel to divulge any defense he intends to make at trial.[38] In contrast, the ABA Standards leave the decision of whether discovery should be permitted to the discretion of the court.[39] The federal rules do not make defenses discoverable.

Keller and the ABA Standards[40] provide the disclosure to the state of the names and last known addresses of witnesses intended

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> Subject to constitutional limitations, the trial court *shall*, on written motion, require that the State be informed of . . . scientific tests, experiments or comparisons, or any other reports or statements of experts which defense counsel has in his possession or control . . . .

Id. (emphasis added).

[32]Upon written motions, "the trial court *may* require disclosure." ABA STANDARDS § 3.2, at 2 (Oct. Supp.) (emphasis added).

[33]*Id.* at 2-3. The prefacing phrase, "Subject to constitutional limitations," encompasses the restriction that the only reports discoverable are those which defense counsel intends to use at trial.

[34]FED. R. CRIM. P. 16(b)(1)(B).

[35]ABA STANDARDS § 3.2, at 2 (Oct. Supp.).

[36]FED. R. CRIM. P. 16(b)(1)(B).

[37]*Id.*

[38]"Subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel *shall* inform the State of any defenses which he intends to make at a hearing or trial." 317 N.E.2d at 436 (emphasis added).

[39]ABA STANDARDS § 3.3, at 3 (Oct. Supp.).

[40]*Id.*

to be called at trial. However, only *Keller* permits pretrial discovery of documented witness statements.[41]

Both *Keller* and the federal rules[42] provide for prosecutorial discovery of tangible evidence that the accused intends to use at trial. The ABA Standards do not provide for such discovery.

IV. Setting the Scene for *Keller*

In order to justify the catapulting effect of prosecutorial discovery in Indiana, the *Keller* majority relied substantially on two United States Supreme Court cases which only inferentially relate to broad prosecutorial discovery.

In *Williams v. Florida,*[43] the Court upheld, against a fifth amendment attack, Florida's notice-of-alibi statute,[44] which required the defendant to inform the state of the witnesses he intended to call prior to trial. The Court reasoned: "At most, the rule only compelled petitioner to accelerate the *timing* of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial."[45] On this theory, the Court held that there was no legal compulsion, and therefore, no violation of the petitioner's privilege against self-incrimination.[46] The Court also said: "Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense."[47]

Three years later, the Supreme Court decided *Oregon v. Wardius.*[48] This case is often quoted as holding that "discovery must be a two-way street."[49] More precisely, the majority stated, "We hold that the Due Process Clause of Fourteenth Amendment forbids enforcement of abili rules unless reciprocoal discovery rights are given to criminal defendants."[50]

With the mandate of *Williams* and *Wardius,* proponents of prosecutorial discovery have launched eagerly into broad discov-

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[41] 317 N.E.2d at 436.

[42] Fed. R. Crim. P. 16(b)(1)(A).

[43] 399 U.S. 78 (1970).

[44] Fla. R. Crim. P. 1.200. Defendant, who was charged with robbery, complied with the statutory notice of alibi.

[45] 399 U.S. at 85 (emphasis added).

[46] *Id.*

[47] *Id.*

[48] 412 U.S. 470 (1973). At the trial level, defendant was prevented from introducing any evidence to support his alibi defense as a sanction for his failure to comply with the notice-of-alibi rule. However, the Court held that due process forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants.

[49] *E.g.*, Keller v. Criminal Court, 317 N.E.2d 433, 438 (Ind. 1974).

[50] 412 U.S. at 472.

ery powers for the state. *Keller* suggests that if pretrial revelation of an alibi defense does not violate the accused's privilege against self-incrimination, then neither should the pretrial discovery of any other defense that the accused intends to make at trial.[51] *Wardius* is cited for the proposition that since defense discovery has already blossomed, to be a true "two-way street," prosecutorial discovery also should be expanded. Thus, *Keller's* "reciprocity" is justified, and with it, broad prosecutorial discovery rights are permitted in Indiana.

However, Justice Black's dissent in *Williams* warned of the snowballing effect that might result if the full implications of the *Williams* holding were carried to their logical extremes. Justice Black foresaw the possibility of an

> inch-by-inch, case-by-case process by which the rationale of today's decision can be used to transform radically our system of criminal justice into a process requiring the defendant to assist the State in convicting him, or be punished for failing to do so.[52]

Interestingly, a popularly suggested sanction for those who do not disclose information pursuant to a discovery order, due to constitutional considerations, is to exclude the evidence that the defendant may desire to introduce at trial.[53]

The question remains whether it is desirable to extend the *Williams* rationale for alibi defenses to *any* defense that the defendant may want to introduce at trial. Resigning itself to the holding in *Williams,* the ABA Advisory Committee stated, "[T]here is no apparent reason why a general requirement of disclosing the nature of any defense ought not be equally valid."[54]

Historically, the privilege against self-incrimination was engendered from an attempt to guard against the notorious tactics of England's courts of Star Chamber.[55] In the courts of the Star Chamber, "the accused could be made to participate in the proceedings, and this mandate could be enforced by torture."[56] Entertaining the possibility of a subtle recurrence of similar tactics and speaking critically of Illinois Rule of Criminal Discovery 413(d), which is identical to the pretrial relinquishing of defenses portion in *Keller,* one commentator stated: "The scope of rule 413(d)

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[51]317 N.E.2d at 436-37.

[52]399 U.S. at 115 (Black, J., dissenting).

[53]FED. R. CRIM. P. 16(d)(2); ILL. R. CRIM. DISCOVERY § 413(d).

[54]ABA STANDARDS § 3.3, at 5 (Oct. Supp.).

[55]399 U.S. at 115-16; Note, *Constitutional Infirmities of the Revised Illinois Rules of Criminal Discovery,* 7 JOHN MAR. J. PRAC. & PROC. 364, 369 (1974).

[56]Note, *supra* note 55, at 369. *See also* 399 U.S. at 115.

goes far beyond the reciprocal notice-of-alibi rule upheld in *Williams v. Florida* . . . . This kind of pretrial discovery was unknown to English law except in proceedings in the Star Chamber courts."[57]

The *Williams* rationale should not apply to all defenses. An alibi defense is unusually burdensome on the prosecution when revealed during trial for the first time because "of the relative ease with which the defense can be fabricated and the difficulty of rebuttal."[58] With a surprise alibi, a continuance is often fruitless for the state.[59]

Although the majority in *Keller* chose to follow the *Williams* example, it might well have learned from the California experience. *Jones v. Superior Court*[60] permitted prosecutorial discovery in California a full eight years before *Williams*. In *Jones*, a rape case, the defendant was granted a continuance to gather medical evidence to prove his impotency. The state filed a motion for discovery, which requested all of the reports, X-rays, and names and addresses of the physicians who treated or examined the defendant. Writing for the majority, Justice Traynor held that, although the motion was too broad, the state would be entitled to names and addresses of witnesses the defendant intended to call and any reports and X-rays the defendant intended to introduce into evidence in support of his affirmative defense of impotency.[61] Justice Traynor reasoned that the discovery order did not compel the defendant to relinquish any evidence "other than that which he would voluntarily and without compulsion give at trial."[62] However, the discovery of witnesses and reports that the defendant did not intend to introduce into evidence at trial would be a violation of his privilege against self-incrimination.[63] In contrast, *Keller* allows the state to discover *all* of the reports in the possession of the defendant, without regard to the defendant's intention to rely upon them at trial.

Prosecutorial discovery thrived in California until 1970, the same year that *Williams* was decided. In *Prudhomme v. Superior*

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[57]Doherty, *Total Pretrial Disclosure to the State: A Requiem to the Accusatorial System*, 60 ILL. B.J. 534, 536 (1972). Rule 413(d) deals with discovery of the accused's defenses, witnesses, and tangible evidence.

[58]Note, *supra* note 55, at 381.

[59]*But see id.* at 380.

[60]58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962). *Jones*, a rape case, was the first major decision which granted prosecutorial discovery. The prosecution's discovery was limited to the items which the defendant intended to introduce at trial.

[61]*Id.* at 61-62, 372 P.2d at 922, 22 Cal. Rptr. at 882.

[62]*Id.*

[63]*Id.* at 60, 372 P.2d at 921, 22 Cal. Rptr. at 881.

Court,[64] the California Supreme Court held a discovery order void because "it [did] not clearly appear from the face of the order or from the record below that the information demanded . . . [could not] possibly have a tendency to incriminate [the defendant]."[65] The nullified discovery order required the defendant to disclose the names, addresses, and the expected testimony of witnesses that he intended to call at trial. The *Prudhomme* test for granting prosecutorial discovery is that there must be reasonable demand for factual information pertaining to a particular defense which does not present a substantial hazard of self-incrimination.[66]

Bradshaw v. Superior Court[67] was a companion case to *Prudhomme*. *Bradshaw* reasserted the *Prudhomme* test to the extent that prosecutorial discovery is prohibited unless it clearly appears from the face of the order that the information sought could not possibly incriminate the defendant.[68] *Prudhomme* and *Bradshaw* established the rule in California that, if a disclosure could serve as a "link in the chain" of evidence tending to establish guilt, the information is not discoverable by the prosecution for discovery would violate the defendant's privilege against self-incrimination.[69]

After eight years of prosecutorial discovery in the wake of *Jones*, why did the California Supreme Court retrench its position in 1970 to the degree expressed in *Prudhomme* and *Bradshaw?* One writer believes that *Prudhomme* and *Bradshaw* were merely misdirected forecasts of the United States Supreme Court's opinion in *Williams*.[70] To give credence to his theory, the writer quotes from *Prudhomme* which states that "*Jones* relied heavily upon the *assumed constitutionality* of the state 'alibi' statutes."[71] The writer implies that the *Prudhomme* court fully expected alibi statutes to be invalidated by the Supreme Court.

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[64]2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970). In a pending murder case, the defendant was ordered to disclose the names and addresses of all witnesses and any defense upon which he intended to rely at trial. The pretrial discovery order was held to be too broad, and thus it violated the accused's constitutional rights.

[65]*Id.* at 322, 466 P.2d at 674, 85 Cal. Rptr. at 130.

[66]*Id.* at 327-28, 466 P.2d at 678, 85 Cal. Rptr. at 134.

[67]2 Cal. 3d 332, 466 P.2d 680, 85 Cal. Rptr. 136 (1970). The discovery order which required the accused to produce expected testimony of each witness intended to be called at trial was beyond the trial court's jurisdiction where it did not clearly appear that disclosure of such information could not possibly incriminate the accused.

[68]*Id.* at 333, 466 P.2d at 681, 85 Cal. Rptr. at 137.

[69]Prudhomme v. Superior Court, 2 Cal. 3d 320, 326, 466 P.2d 673, 677-78, 85 Cal. Rptr. 129, 133 (1970). *See* Kane, *Criminal Discovery—The Circuitous Road to a Two-Way Street*, 7 U. SAN FRANCISCO L. REV. 203, 208 (1973).

[70]Kane, *supra* note 69, at 208-09.

[71]2 Cal. 3d at 324, 466 P.2d at 676, 85 Cal. Rptr. at 132 (emphasis added).

However, another authority interprets *Prudhomme* and *Bradshaw* in a different light—that *Prudhomme* was prompted by "increased emphasis placed upon the Fifth Amendment privilege against self-incrimination by the United States Supreme Court in a series of cases decided since *Jones*."[72] The writer summarized by stating the following:

> It is the view of the author that the restrictions imposed by the *Prudhomme* court, after several years' experience with broad rights of discovery in the prosecution, were wise and necessary to insure that criminal prosecutions remain accusatorial rather than inquisitorial in nature.[73]

The second of the major cases that *Keller* relied on for its decision, *Oregon v. Wardius*,[74] was cited by *Keller* as holding that discovery, to be valid, must be a two-way street,[75] that is, reciprocal. But, the thrust of *Wardius* was not to give the prosecution expanded powers of discovery. It simply held that, to enforce the existing prosecutorial discovery rights and the sanctions for noncompliance, similar rights of discovery must be afforded the defendant. *Wardius* was primarily a due process case affording protection to the accused. In *Wardius*, the Supreme Court indicated that, due to the state's inherent information-gathering advantages, any imbalance in discovery rights should work in the defendant's favor.[76]

In *Keller*, Chief Justice Arterburn's majority opinion misuses the "two-way street" concept to authorize overwhelming discovery privileges to the state. The opinion interprets *Wardius* to hold that "disclosure requirements must be fairly balanced between the parties."[77] However, the court ignored the factual context of *Wardius*. Justice Peters' concurring opinion in *Prudhomme* states a contrary view. Justice Peters stated: "Discovery is not a 'two-way street' because of the constitutional rights of the defendant not accorded the prosecution, and we should frankly and directly so hold."[78] The one-way street Justice Peters is promoting would be travelled primarily by the accused. Conversely, the one-way street that *Wardius* set out to abolish was dominated by the state.

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[72]Lapides, *Cross Currents in Prosecutorial Discovery: A Defense Counsel's Viewpoint*, 7 U. SAN FRANCISCO L. REV. 217 (1973). Lapides cites several cases as examples: Miranda v. Arizona, 384 U.S. 436 (1966); Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1 (1964).

[73]Lapides, *supra* note 72, at 218.

[74]412 U.S. 470 (1973).

[75]317 N.E.2d at 438.

[76]412 U.S. at 475 n.9.

[77]317 N.E.2d at 437.

[78]Prudhomme v. Superior Court, 2 Cal. 3d 320, 327-28, 466 P.2d 673, 678, 85 Cal. Rptr. 129, 134 (1970) (Peters, J., concurring).

V. Justifications for and Criticisms of Prosecutorial Discovery

"The lofty prime objective of the adversary system . . . is the ascertainment of truth."[79] This maxim makes a secure springboard for the proponents of liberal prosecutorial discovery. With broad discovery privileges afforded to the state, the prosecution will have a better grasp of the facts and thereby reduce the chance of surprise at trial. Also, both parties will be able to take a practical approach to plea negotiations.

However, Justice DeBruler, in his dissenting opinion, viewed prosecutorial discovery as a possible obstruction to the attainment of the truth, and, indeed, a threat to the very basis of the adversary system.[80] He suggested that, with broad discovery rules, the discrepancies in the perceptions of the opposing parties will "become resolvable by plea bargaining as both counsel become less and less interested in pressing their views to trial, and therefore getting at the truth."[81] Justice DeBruler also feared that the search for truth will become dulled when police and prosecutor cease investigative efforts and rely solely upon advantageous information gathered from discovery.[82]

One of the arguments for the aggrandizement of prosecutorial discovery rights is that the discovery advantages of the defendant are so overwhelming that a neutralizing factor needs to be introduced into the system. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States declared that "the two—prosecutorial and defense discovery—are related and that the giving of a broader right of discovery to the defense is dependent upon giving also a broader right of discovery to the prosecution."[83] Yet, the most influential factor in the earlier trend toward more liberal defense discovery was the growing realization that the prosecution has a tremendous discovery advantage.[84]

Other writers suggest that "[d]iscovery by the prosecution tends to upset the balance by adding to the state's already superior investigative power, tactical advantages, and financial resources."[85] Numerous informal state discovery devices are inher-

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[79]Kane, *supra* note 69, at 203.

[80]317 N.E.2d at 443 (DeBruler, J., dissenting).

[81]*Id.*

[82]*Id.* at 444.

[83]*Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts*, 48 F.R.D. 553, 595 (1970) (Advisory Committee Notes).

[84]Note, *Criminal Discovery—Comparison of Federal Discovery and the ABA Standards with the New Statutory Provisions in Wisconsin*, 1971 Wis. L. Rev. 614, 617-18.

[85]Note, *supra* note 55, at 371.

ent in the criminal justice system. Among these are the right of the state to thoroughly search the accused,[86] access to electronic eavesdropping and wiretaps to gather evidence,[87] the right to compel, with reason, the accused to exhibit his body, assume poses, put on or take off clothes for identification, participate in a line-up, provide examples of his handwriting, provide fingerprints, or speak for voice identification.[88] The prosecution also may obtain samples of the defendant's blood, breath, or urine for scientific analysis when not unreasonable to do so.[89] In addition, the state has certain statutory advantages in Indiana.[90] Thus, the state's means to obtain pretrial information is quite substantial, even in the absence of the extensive formal discovery privileges bestowed upon the state by *Keller*.

The grand jury also provides the prosecution with discovery devices. "[T]he prosecution may call the 'accused' as a witness prior to his being formally charged with an offense."[91] The grand jury does not afford the defendant the procedural rights to notice, to be heard, to present witnesses, to confront or cross-examine witnesses, to counsel, and to a statement of reasons for any determination against him.[92]

Finally, and most significantly, "[t]he prosecution has the manpower of all police agencies in its jurisdiction at its disposal, along with state and federal laboratory facilities and expertise."[93] By comparison, the resources of the accused are usually extremely restricted. The argument for prosecutorial discovery which suggests that, as with defense discovery, the accused has every advantage cannot be supported. The primary reason for the introduction of defense discovery should not now be used to justify expanded prosecutorial discovery.

Another proposed justification for broad prosecutorial discovery is that it would prevent surprise at trial. Admittedly, the state's interest in preventing surprise is important. The danger of surprise is that an accused, who committed a criminal act, can escape punishment by presenting a defense for which the prosecution has been unable to prepare. For example, in a murder trial, the defense may introduce an unexpected witness who testifies to

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[86]Chimel v. California, 395 U.S. 752 (1969).

[87]Nakell, *The Effect of Due Process on Defense Discovery*, 62 KY. L.J. 58, 70 (1973).

[88]*Id.* at 70-71.

[89]Note, *supra* note 84, at 615.

[90]IND. CODE §§ 35-5-1-1, 35-5-2-1, 35-1-31-8 (Burns 1975). See notes 22-24 *supra*.

[91]Note, *supra* note 84, at 615.

[92]Nakell, *supra* note 87, at 81.

[93]Note, *supra* note 84, at 615.

self-defense. However, in many states, statutes afford the state advance notice of the defenses which lend themselves more readily to surprise—alibi, insanity, and impotency.[94] And, when the state is truly surprised at trial, an available remedy exists in the form of a continuance.[95] This remedy can be complemented by more effective use of the prosecution's vast investigative resources, so as to significantly mitigate the probability of surprise.[96] Because alternative means of curbing surprise at trial are available to the state, prosecutorial discovery need not be instituted for that purpose.

The threat of perjury also haunts the proponents of broad prosecutorial discovery. It is feared that, with some knowledge of the state's case against him and with the testimony of all the witnesses before him, the defendant will mold his testimony to meet the exigencies of his case. Again, this is a fundamental concern. Yet, when is the threat of perjury most urgent? The probability of perjury is unlikely with tangible evidence.[97] Likewise, "[d]efenses based on expert testimony and scientific experiment are not as susceptible of fabrication in light of the professional character of the witnesses involved."[98] In addition, the probability of fabrication is reduced with defenses relying on the use of witnesses and documents. The state seeks to protect itself from the possibility of undetected perjury. Yet, in compliance with Canon 7 of the *ABA Code of Professional Responsibility*, the defendant's conduct is constantly marshalled by an officer of the court—the defense counsel. Furthermore, whenever the defendant's testimony conflicts with that of other more credible witnesses or with the weight of the evidence, its credibility will be questioned by the trier of fact. In most cases, by effective use of its investigative resources, the state should be aware of the potential for perjured testimony.

The final justification for prosecutorial discovery is that it will produce greater efficiency in the slow and cumbersome criminal justice system. In the discussion of surprise and perjury, a continuance was suggested as the appropriate remedy available to the state. But a continuance is an impure device. In a jury trial, the disruption caused by a continuance can be disadvantageous to the parties, as well as work an unnecessary hardship

[94]Indiana does not require pretrial notice to the state of an impotency defense.

[95]Dyer, *Prosecutorial Discovery: How Far May the Prosecution Go?*, 7 U. SAN FRANCISCO L. REV. 261, 278 (1973).

[96]Note, *supra* note 55, at 380.

[97]*Id.* at 381.

[98]*Id.*

on the jury. A continuance is costly, inconvenient due to disruption of the trial, and serves to clog an already backlogged docket.

However, although continuances cause administrative problems, these must be overlooked if justice, in the end, is served. Expedition is a valid goal, but so too is the preservation of constitutional rights. Engraved in the Bill of Rights are a defendant's rights to a fair trial,[99] to trial by jury,[100] to counsel,[101] and to protection against self-incrimination. These rights were extended to the accused in a criminal trial by design, not by chance. And, when it appears that there is a conflict between constitutional rights and administrative procedures, the former must prevail. "The disadvantage of disrupting the trial process is slight when compared to constitutional interests of the accused."[102]

Prosecutorial discovery should not be coextensive with defense discovery. On the state level, the prosecution has massive information-seeking resources at its disposal. And, nowhere in the United States Constitution is there a provision which protects the rights of the state at trial. *Brady v. Maryland*[103] serves as a model for the relative positions of the accused and the state. In *Brady,* the prosecution failed to show the defense a co-defendant's statement in which he admitted committing the homicidal act. Speaking for the majority, Justice Douglas said:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution.[104]

It is interesting to note that *Keller* attempts to require the defense to produce evidence favorable to the prosecution, an overt distortion of *Brady.* For example, *Keller* requires the defense to disclose all medical or scientific reports or examinations, regardless of whether the defense intends to rely on them at trial. Arguably, a discovery order of this type may well be a violation of an accused's fifth amendment privilege against self-incrimination.

VI. The Privilege Against Self-Incrimination

Three elements must be present before the defendant can successfully assert a violation of his constitutional privilege against

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[99]U.S. Const. amends. V, VI, XIV.
[100]U.S. Const. amend. VI.
[101]U.S. Const. amend VI.
[102]Note, *supra* note 55, at 380.
[103]373 U.S. 83 (1963).
[104]*Id.* at 87.

self-incrimination. The communication must be testimonial, legally compelled, and incriminating.[105] The scope of discovery endorsed by *Keller* is not exempt from a fifth amendment attack based upon an analysis of the self-incrimination elements.

The United States Supreme Court held that the privilege is violated only when the accused is forced to provide the state with evidence of "a testimonial or communicative nature."[106] Justice Traynor of the California Supreme Court intimated in *People v. Ellis*[107] that a testimonial communication is one in which "the State relies on the veracity of the accused."[108] Another authority suggests that the fifth amendment protects "activities whose value as evidence to prove guilt is in any way related to the reliability of the accused's cooperation."[109] Still another author states that the privilege protects only those disclosures which reveal the "thoughts or state of mind of the accused."[110]

Regardless of the distinctions apparent in the interpretations of "testimonial or communicative" evidence, information sought under an order for prosecutorial discovery is, arguably, testimonial, because the information is discovered by obtaining the benefit of the defendant's knowledge.[111] *Keller* provides for the disclosure of a list of witnesses whom the accused intends to call at trial. There is no doubt that the prosecutor will rely on the list. The prosecutor will learn as much as possible concerning the forthcoming testimony of the witnesses, and, if the opportunity presents itself, he will use the witnesses in his case against the accused. In this instance, it would be naive to deny that the veracity or trustworthiness of the witness list depends on "the perception and cognitive processes"[112] of the accused. Therefore, it would be a testimonial disclosure. Likewise, disclosure to the state of documents prepared by the defendant would be testimonial if the prosecution

[105]McCormick's Handbook of the Law of Evidence §§ 123-25 (2d ed. E. Cleary 1972).

[106]Schmerber v. California, 384 U.S. 757, 761 (1966). The Court held that the taking of blood samples to prove drunkenness is not violative of the privilege against self-incrimination because the evidence was not of a testimonial or communicative nature.

[107]65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966). In a case of assault with intent to commit rape, the court overruled defendant's contention that requesting him to speak so that the victim might attempt to identify his voice was a violation of his privilege against self-incrimination.

[108]*Id.* at 534 n.4, 421 P.2d at 395 n.4, 55 Cal. Rptr. at 387 n.4.

[109]McCormick's Handbook of the Law of Evidence § 126, at 266 (2d ed. E. Cleary 1972).

[110]Note, *Prosecutorial Discovery Under Proposed Rule 16*, 85 Harv. L. Rev. 994, 1002 (1972).

[111]Dyer, *supra* note 95, at 271.

[112]Note, *supra* note 110, at 1003.

relies on their substantive content for evidence or leads to evidence.[113] Another example of a testimonial disclosure would be the discovery by the state of tangible evidence that the defendant intended to introduce at trial. Here, the defendant would be communicating that the item exists and that, in his estimation, it is relevant to the case.[114]

Perhaps the most questionable disclosure endorsed by *Keller* is in the area of medical or scientific reports. As noted earlier, *Jones v. Superior Court*[115] denied the prosecution the right to discover any medical reports other than those that the accused intended to introduce at trial.[116] For the most part, this reasoning has prevailed in the area of prosecutorial discovery for over twelve years. The justification in foreclosing the state from discovering all reports in the accused's possession is that the state would be seeking "the benefit of his [the accused's] knowledge of the existence of possible witnesses and the existence of possible reports and x-rays for the purpose of preparing its case against him."[117] Clearly, *Keller* transgresses these limits.

Like the "testimonial" requirement, prosecutorial discovery may also contravene the "incrimination" element of the privilege. *Hoffman v. United States*[118] states that the self-incrimination privilege must be accorded liberal construction.[119] Indeed, *Hoffman* extended the privilege to disclosures "which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."[120]

The danger of incrimination is more than a possibility with the disclosures endorsed by *Keller*. There is an obvious threat of incrimination if the defendant is forced to reveal the names of witnesses whom he intends to call at trial.[121] The witness may serve to support one portion of the defendant's case. Yet, if the witness has knowledge of information that might incriminate the

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[113] *Id.*

[114] *Id.* at 1004.

[115] 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

[116] *Id.* at 58, 372 P.2d at 922, 22 Cal. Rptr. at 882.

[117] *Id.* at 57, 372 P.2d at 921, 22 Cal. Rptr. at 881.

[118] 341 U.S. 479 (1951). Petitioner, a known racketeer, was convicted of criminal contempt when he refused to answer questions put to him by the grand jury concerning his occupation and his connections with a fugitive witness sought by the grand jury.

[119] *Id.* at 486.

[120] *Id.* On the state level, the California Supreme Court, in *Prudhomme*, employed the "link of the chain" standard, which requires the judge to determine that disclosure cannot possibly tend to incriminate the defendant before discovery can be granted to the prosecution. Prudhomme v. Superior Court, 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970).

[121] Dyer, *supra* note 95, at 276.

defendant, disclosure would supply the state with information that it could use in its case-in-chief against the defendant.[122] For example, if the defendant intends to call a certain witness to testify that the defendant was forced to kill in self-defense, disclosure would provide the prosecution with its sole eyewitness to the defendant's homicide.[123] And, as illustrated in *Prudhomme,* "consider the effect of disclosing the name or expected testimony of witness B, whom defendant intends to call only as a 'last resort' to testify that defendant only committed a lesser-included offense."[124] The risk of self-incrimination also exists where the order is for discovery of tangible evidence or documents. For example, in a murder trial, the defendant may possess articles of clothing on which there are blood stains. This evidence could be relevant to self-defense.[125] And finally, even where the evidence or witnesses disclosed are exculpatory, they may lead the prosecution to other evidence which could be used against the defendant.[126]

Proponents of prosecutorial discovery contend that since discovery is conditioned on the defendant's intent to introduce the disclosed information or evidence at trial, it is unlikely that such evidence will be incriminating.[127] But where there is a chance that potentially incriminating evidence may serve to exculpate the defendant, such as in the self-defense example, he must disclose it prior to trial in order to rely upon it at trial. Thus, the defendant faces a dilemma. And, in *Keller,* state discovery of medical and scientific reports is not conditioned on the defendant's intent to introduce the disclosed evidence at trial. In fact, if the accused chooses not to use evidence in support of his case, it may often be assumed that the evidence is incriminating in character.[128]

The third requirement in the trilogy of elements that comprise the privilege against self-incrimination is that the communication must be legally compelled. It is on this ground that pro-

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[122]*Id.*

[123]*See* Prudhomme v. Superior Court, 2 Cal. 3d 320, 327, 466 P.2d 673, 677, 85 Cal. Rptr. 129, 133 (1970); Dyer, *supra* note 95, at 276; Note, *supra* note 55, at 374.

[124]2 Cal. 3d at 327, 466 P.2d at 677, 85 Cal. Rptr. at 133.

[125]Note, *supra* note 55, at 374.

[126]Note, *supra* note 110, at 1005.

[127]Note, *supra* note 55, at 374.

[128]Nakell, *Criminal Discovery for the Defense and Prosecution—The Developing Constitutional Considerations,* 50 N.C.L. REV. 483, 501 (1972). In Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962), the California Supreme Court denied state discovery of all medical reports in the accused's possession, although one of the reports may have concluded that Jones was physiologically capable of rape. But, the report may have also indicated that psychological impotency was a real possibility, and psychological impotency often is accompanied by aggressive tendencies.

ponents of broad prosecutorial discovery are most likely to argue the inapplicability of the fifth amendment privilege.[129]

In *Williams v. Florida*,[130] the United States Supreme Court held that the privilege against self-incrimination is not violated by "a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses."[131] Although alibi had been previously distinguished from most other defenses because of the ease with which it can be fabricated and the difficulty of rebuttal,[132] *Williams* presents a strong argument for prosecutorial discovery. The Florida notice-of-alibi statute[133] required the defendant to give pretrial notice to the state of his alibi defense. And, if the defendant did not comply with the statute, any evidence that would support an alibi, other than the defendant's testimony, would be excluded at trial.[134] The Supreme Court reasoned that "[h]owever 'testimonial' or 'incriminating' the alibi defense proves to be, it cannot be considered compelled . . . ."[135] The rule only required the defendant to accelerate the *timing* of his disclosure.[136]

In support of the proposition that pretrial disclosure is only a matter of timing, the Court reasoned that since no violation of the privilege would result if the state were permitted a continuance following discovery, "then surely the same result may be accomplished through pretrial discovery, . . . [thus] avoiding the necessity of a disrupted trial."[137] However, there are inherent fallacies in this approach. First, depending upon how well the state carries its burden of proof, the defense does not know prior to trial what it should risk introducing into evidence.[138] Second, pretrial disclosure is more beneficial to the prosecution than is disclosure at trial, because, in the latter situation, "the prosecution has already presented its case and can only use the knowledge obtained to rebut the defense."[139] Permitting pretrial disclosure of witnesses only adds to the probability that the state will use the witnesses or

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[129]Note, *supra* note 55, at 374.

[130]399 U.S. 78 (1970).

[131]*Id.* at 83.

[132]Note, *supra* note 55, at 381.

[133]FLA. R. CRIM. P. 1.200.

[134]*Id.*

[135]399 U.S. at 84.

[136]*Id.* at 85.

[137]*Id.* at 86.

[138]ABA STANDARDS at 5 (Oct. Supp.).
Where as the prosecution necessarily sets a formal "battle plan" to be followed, the defense frequently seeks to achieve maximum flexibility, having certain arguments and evidence in readiness, the use of which is contingent upon the defense's evaluation of the prosecution's presentation and the exigencies of the courtroom situation.

[139]Dyer, *supra* note 95, at 274-75.

evidence revealed in its case-in-chief, thereby increasing the chance of incrimination.

Although *Williams* held that there is no compulsion when the defendant is forced to reveal his alibi defense and witnesses prior to trial, the opinion emphatically stated that, since the defendant chose to comply with the requirements of the statute, the validity of the threatened sanction (exclusion of all evidence relevant to the defense) was not taken into consideration.[140] The question raises sixth amendment problems, but the Court had "no occasion to explore" them.[141] However, by ignoring the sixth amendment implications which were intertwined with the enforcement of the alibi statute, the Court avoided the very issue that it had embarked upon deciding—the issue of legal compulsion in light of the defendant's fifth amendment privilege.

It can be assumed that a defendant will comply with a *Williams*-type alibi statute because, if he does not comply, he will be pre-empted from presenting his defense. By threatening to strip the defendant of his sixth amendment right to present a defense,[142] the statute coerces the defendant to disclose to the state testimonial evidence which is potentially incriminating. A defendant should not be faced with the dilemma of having to sacrifice one constitutional right in order to preserve another.[143]

In *Malloy v. Hogan*,[144] the Supreme Court, in dicta, stated that the fifth amendment guarantees the right of a person to "remain silent unless he chooses to speak in the unfettered exercise of his own free will, and to suffer no penalty for such silence."[145] In light of *Malloy*, an example of legal compulsion was found in *Griffin v. California*.[146] There, the Court held that adverse comment by a judge or prosecutor upon the defendant's failure to testify was sufficient compulsion to violate the fifth amendment privilege.[147] In reference to the *Griffin* holding, one critic states that "[b]y comparison . . . the loss of the opportunity to present evidence in one's defense which could result from failure to dis-

[140]399 U.S. at 83 n.14.

[141]*Id.*

[142]U.S. CONST. amend. VI.

[143]Note, *supra* note 110, at 998.

[144]378 U.S. 1 (1964). After pleading guilty to a gambling misdemeanor, petitioner was ordered to testify before a referee appointed by a state court to investigate gambling. Petitioner refused to answer questions concerning the circumstances of his arrest on the ground that the answers might incriminate him. The Court upheld this contention.

[145]*Id.* at 8.

[146]380 U.S. 609 (1965).

[147]*Id.* at 614.

close is surely a greater penalty."[148] Logically, legal compulsion should include forcing the accused to reveal his evidence prior to trial in order to preserve his constitutional right to introduce the evidence at trial.

Keller does not suggest any means by which to enforce the state's right to pretrial discovery of the defendant's case. However, preclusion of the accused's right to present evidence at trial is a permitted sanction for non-compliance in the Federal Rules of Criminal Procedure[149] and in state provisions which endorse broad prosecutorial discovery.[150] Alternative sanctions are a court order, contempt charges against the attorney (although the attorney-client privilege may be an obstacle), prohibiting further discovery by the defendant, or a continuance, which is supported by the ABA.[151]

Two years after the *Williams* decision, the Court decided *Brooks v. Tennessee*.[152] At issue was a state statute, which required that if the defendant chose to testify in his own behalf, he must do so prior to any other defense testimony or else waive his right to testify later in the defense's case-in-chief. Writing for the majority, Justice Brennan stated:

> [T]he rule . . . is an impermissible restriction on the defendant's right against self-incrimination . . . . [A] defendant's choice to take the stand carries with it serious risks of impeachment and cross-examination; it "may open the door to otherwise inadmissable evidence which is damaging to his case," . . . .[153]

Brooks appears to undermine *Williams*. *Williams* justified pretrial disclosure accompanied by a preclusion sanction because it was only a matter of "timing." In *Brooks*, timing was also a factor. If the defendant intended to testify in his own behalf, surely forcing him to testify at the onset of the defense's case-in-chief would not prejudice him. And, certainly, the chance of the defendant's perjuring himself would be greatly reduced, because he would not have an opportunity to mold his testimony around that of other defense witnesses. Yet, two years after *Williams*, the Supreme Court recognized the obvious threat to the defendant's constitutional rights. Commenting upon the consequences

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[148]Note, *supra* note 110, at 1006.

[149]FED. R. CRIM. P. 16(d)(2).

[150]*See, e.g.*, ILL. R. CRIM. DISCOVERY § 413(d).

[151]ABA STANDARDS § 3.3, at 6 (Oct. Supp.).

[152]406 U.S. 605 (1972).

[153]*Id.* at 609, *quoting from* McGautha v. California, 402 U.S. 183, 213 (1971).

of forcing the defendant to testify first, Justice Brennan said: "By requiring the accused and his lawyer to make that choice without an opportunity to evaluate the actual worth of their evidence, the statute restricts the defense—particularly counsel—in the planning of its case."[154] The same observation can be made with respect to requiring the defendant to divulge his case prior to trial. The Court recognized the defendant's interest in preserving his option to present a defense in the manner most advantageous to his case.

VII. Conclusion

The adversary system was founded on the proposition that, regardless of the crime involved, the accused has certain individual rights which must not be usurped. Having learned from the tactics of the courts of Star Chamber and institutions in other less democratic lands, Indiana and other states, when searching for the truth, should conscientiously weigh the value of the accused's right not to be a witness against himself.

As the crime rate increases across the country, the means of controlling the incorrigible become more stringent. Society must protect itself from itself. Yet, some values are too basic to sacrifice in the interests of restraint and authority. Clearly, the accused in the criminal courts is being threatened with the usurpation of his right not to be a witness against himself. As stated in *Brady v. Maryland*,[155] "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[156]

Tony H. Abbott

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[154]406 U.S. at 612.
[155]373 U.S. 83 (1963).
[156]*Id.* at 87.

Privileged Communications: The Federal Rules of Evidence and Indiana Law; Who's Got a Secret?

I. Introduction

The first statutory rules ever enacted to govern evidentiary questions in federal courts, the Federal Rules of Evidence, became effective July 1, 1975. The rules are the culmination of almost thirteen years of study by distinguished judges, members of Congress, attorneys, academicians, and others interested in the administration of justice.[1] This Note is addressed to Federal Rule of Evidence 501, the single rule comprising Article V: Privileges. More specifically, the Note will examine the right of certain persons to withhold testimony about certain communications they may have with certain other persons.

Evidentiary privileges are exceptions to the general requirement that every witness must give testimony in court about all facts material and relevant.[2] Privileges may be divided into (1) those which directly protect the individual, such as the constitutional privileges excluding evidence obtained through illegal search and seizure and the privilege against self-incrimination;[3] (2) those privileges designed to protect the integrity of government, such as the privilege of a probation officer to protect data received in the discharge of his duties;[4] and (3) those privileges which are designed to protect interests and relationships regarded as having sufficient social importance to justify the sacrifice of facts needed in a judicial inquiry.[5] Relationships to be protected in the third group, the focus of this Note, include, but are not limited to, those between attorney and client, husband and wife, physician and patient, and clergyman and communicant.

An Advisory Committee on Rules of Evidence, appointed by Congress in 1965, compiled a set of rules which the Supreme Court transmitted to Congress in 1972. The proposed rules, popularly known as "the Supreme Court version," included an approach to privilege law which is markedly different from that enacted by

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[1]For a concise history of those years of effort, see H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 2-4 (1973).

[2]8 J. Wigmore, Evidence in Trials at Common Law § 2285 (McNaughton rev. 1961) [hereinafter cited as Wigmore].

[3]U.S. Const. amends. IV, V.

[4]Ind. Code § 33-12-2-22 (Burns 1975).

[5]McCormick's Handbook of the Law of Evidence § 72 (2d ed. E. Cleary 1972) [hereinafter cited as McCormick].

Congress. Although article V of the Supreme Court version, which included thirteen specific rules on privilege, was rejected by Congress, it has been suggested that a study of the proposed rules is a valuable reference in determining the status of the federal common law of privilege.[6]

This Note will examine article V of the Federal Rules of Evidence as enacted by Congress, compare the enacted rule on privilege with the version promulgated by the Supreme Court, review Indiana law of privileged communications, and suggest what influence the new federal rule may have on the development of this area of Indiana law.

II. Federal Rule of Evidence 501

Article V: Privileges, of the Federal Rules of Evidence, provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

What does the new rule mean and what changes, if any, will it make in the application of state and federal law in federal courts?

Representative William L. Hungate, chairman of the House subcommittee which held hearings on the rules,[7] reported to Congress that the rule was intended to provide that federal law of privilege will apply in all federal criminal cases. Federal law of

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[6]2 J. Weinstein & M. Berger, Commentary on the Rules of Evidence for the United States Courts and Magistrates ¶ 501[02], at 501-20 (1975). The authors suggest that this version, which is the culmination of seven years of effort by leading jurists, attorneys, and academicians, may be viewed as "Standards" to be consulted when a determination of federal common law is required. Though not binding, the proposed rules are a convenient, comprehensive guide to the present state of federal privilege law.

[7]Special Subcommittee on Reform of Federal Criminal Laws of the House Committee on the Judiciary.

privilege is also intended to apply, he reported, in civil actions and proceedings, unless state law supplies the rule of decision for a claim or defense. Where state law does supply the rule of decision, then state privilege law is intended to apply. The term "element of a claim or a defense" was interpreted by Representative Hungate to mean that the evidence in question must tend to support or defeat a claim or defense. If the evidence does tend to support or defeat a claim or a defense, he explained, then the evidence is "an item of a claim or defense."[8]

The Joint Explanatory Statement of the Committee of Conference gives the following interpretation of the rule:

> [S]tate privilege law will usually prevail in diversity cases. There may be diversity cases, however, where a claim or a defense is based upon federal law. In such instances, federal privilege law will apply to evidence relevant to the federal claim or defense. See *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942).[9]
>
> In nondiversity jurisdiction civil cases, federal privilege law will generally apply. In those situations where a federal court adopts or incorporates state law to fill interstices or gaps in federal statutory phrases, the court generally will apply federal privilege law. . . .
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> . . . .
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> In civil actions and proceedings, where the rule of decision as to a claim or defense, or as to an element of a claim or defense is supplied by state law . . . state privilege law [will] apply.[10]

Representative Hungate's presentation of the Conference Report on the Federal Rules of Evidence also included a clear statement that rule 501 is intended to leave the federal law of privilege as it was before the rules were enacted, with federal courts free to develop the law of privilege on a case-by-case basis.[11]

It is thus clear that rule 501 provides for the application of the federal common law of privilege, subject to judicial interpretation, in all federal criminal cases. In civil proceedings, however, there is less clarity, since problems of construction are raised by

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[8]120 CONG. REC. H12,253 (daily ed. Dec. 18, 1974). Representative Hungate made these remarks while explaining the report of the Committee of Conference on the bill to establish rules of evidence.

[9][Author's footnote]. The *Sola* case upheld the doctrine that "the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules." 317 U.S. at 176.

[10]H.R. REP. No. 93-1597, 93d Cong., 2d Sess. 7-8 (1974) (Conference Report).

[11]120 CONG. REC. H12,254 (daily ed. Dec. 18, 1974).

the language of the second sentence of the rule.[12] The Conference Report supports a contention that state law of privilege will govern in federal cases where jurisdiction is based on diversity whenever state law controls the claim or defense in controversy.

Consideration of state privilege law has been recognized by commentators as a primary concern in drafting article V of the Federal Rules of Evidence.[13] Strong support for application of state privilege law in diversity cases includes the observation that some matters affected by these privileges—the marital relationship, for example—fall outside the area of federal legislative competence granted by article I, section 8 of the Constitution. Although recognition of a state privilege not found in the federal rule may defeat federal uniformity and impede the search for truth, the justification for the privilege rules is found in extraneous social policies, which can be effectuated only by permitting certain evidence to be suppressed.[14]

In spite of strong support for the view that state privilege law will continue to apply in diversity cases, the brevity of the rule as adopted may well lead to controversy in construction. The final sentence of rule 501 states that privileges are to be determined in accordance with state law "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision." The Senate Committee on the Judiciary expressed its concern that this language "is pregnant with litigious mischief,"[15] particularly where a question arises concerning the distinction between an "element" of a claim or defense and an "item of proof" regarding a claim or defense. The Senate committee indicated that where testimony is held to be

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[12]"[I]n civil actions and proceedings, with respect to an element of a claim or a defense as to which State law supplies the rule of decision, the privilege . . . shall be determined in accordance with State law."

[13]*See, e.g., A Discussion of the Proposed Federal Rules of Evidence Before the Annual Judicial Conference, Second Judicial Circuit of the United States*, 48 F.R.D. 39 (1969).

[14]

> In federal question litigation and federal criminal cases, it seems to me, there are "affirmative countervailing considerations" sufficient to justify *Erie* policy—namely, the federal interest in correct and just decisions when applying federal law. These considerations aren't present in diversity and other state cases; in such cases, I believe, it does not lie in the mouths of the federal judiciary to say to the state, We will provide a "juster justice" by sacrificing one of your substantive policies (i.e., that underlying the privilege) in order to effectuate others (i.e., those underlying the state law governing the merits of the controversy.)

Id. at 77 (remarks by Professor Harold L. Korn of the New York University School of Law).

[15]S. REP. No. 93-1277, 93d Cong., 2d Sess. 12 (1974).

merely an item of proof rather than an element of a claim, *federal* law on privilege will apply under the language of rule 501, and suggested that definition of an element of a claim or defense may engender considerable litigation.[16] The Senate Report pointed to further confusion possible in a case containing a combination of federal and state claims and defenses, such as an action involving both federal antitrust issues and state unfair competition claims. "Two different bodies of privilege law would need to be consulted. It may even develop that the same witness-testimony might be relevant on both counts and privileged as to one but not to the other."[17]

United States District Judge Jack B. Weinstein's analysis of rule 501 provides a succinct summary of the manner in which the federal judiciary may be expected to apply the law in this area:

> [F]ederal privilege law . . . will always apply in federal criminal cases, generally apply in federal question cases, sometimes apply in diversity cases, and usually apply in cases of conflict.[18]

More explicit determination of the relationship between federal and state privilege law must await decisions under article V of the Federal Rules of Evidence.

III. The Supreme Court Version of the Privilege Rules

The version of Article V: Privileges, proposed by the Advisory Committee and promulgated by the Supreme Court was rejected by Congress. Nevertheless, the proposed rules on privilege will continue to have an impact on interpretation of the law and may be viewed as one measure of the principles of federal common law which congressionally-enacted rule 501 calls upon the judiciary to interpret "in the light of reason and experience." Since the proposed rules and the Advisory Committee Notes represent an important volume of study by eminent legal experts, it is reasonable to assume that they may be consulted as courts develop concepts of federal common law of privilege.[19]

Three caveats must be noted, however, before examining the proposed rules and committee notes. First, emphasis must be placed on the fact that the proposed rules have no binding effect. Second, Justice William O. Douglas dissented from the Supreme Court Order of November 20, 1972, which transmitted to Congress

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[16] *Id.*

[17] *Id.* In such a case, the report suggests, "it is contemplated that the rule favoring reception of the evidence should be applied." *Id.* at 12 n.17.

[18] J. Weinstein & M. Berger, *supra* note 6, ¶ 501[02], at 501-20.

[19] *Id.*

what is known as the "Supreme Court version" of the rules. In that dissent he pointed out that the Court did not write the rules, nor supervise their writing, nor weigh their merits. "The Court concededly is a mere conduit," Justice Douglas wrote, observing that the authors of the rules were members of a congressional committee named by the Judicial Conference. Acknowledging the eminence of the committee members, Justice Douglas emphasized that the committee alone had studied and judged the proposed rules and the Supreme Court had merely approved them. "Yet the public assumes," he concluded, "that our imprimatur is on the Rules, as of course it is."[20] The third caveat to reliance upon the Supreme Court version of article V is found in Representative Hungate's presentation of the rules to Congress, in which he observed that rule 501 as enacted is a much more flexible approach to privilege law than the Supreme Court version.[21] In spite of these reservations, an examination of what the Advisory Committee proposed and the Supreme Court transmitted to Congress has value as a general guide to the present status of the federal law of privilege.

A. Privilege Recognized Only as Provided

Proposed Rule 501 read:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a privilege to:
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> (1) Refuse to be a witness; or
> (2) Refuse to disclose any matter; or

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[20] 409 U.S. 1132 (1972) (Douglas, J., dissenting from the Supreme Court's order of November 20, 1972).

[21]

> Rule 501 [as adopted] is not intended to freeze the law of privilege as it now exists. The phrase "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience," is intended to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis. For example, the Supreme Court's rules of evidence contained no rule of privilege for a newspaperperson. The language of rule 501 permits the courts to develop a privilege for newspaperpeople on a case-by-case basis. The language cannot be interpreted as a congressional expression in favor of having no such privilege, nor can the conference action be interpreted as denying to newspeople any protection they may have from State newspersons' privilege laws.

120 CONG. REC. H12,254 (daily ed. Dec. 18, 1974).

(3) Refuse to produce any object or writing; or
(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.[22]

Twelve separate rules followed in the Supreme Court version of article V, defining specific privileges to be recognized in federal courts as including *only* protection for required reports, relationships of attorney-client, psychotherapist-patient and husband-wife, communications to clergymen, political vote, trade secrets, secrets of State and other official information, and identity of informers.[23] Thus, this version explicitly denied federal recognition to state laws of privilege.

The Advisory Committee's Note to proposed rule 501[24] explains that the decision to avoid giving effect to state privilege law in diversity cases was based on a reading of two United States Supreme Court cases—*Hanna v. Plumer*[25] and *Erie Railroad Co. v. Tompkins*.[26] While the committee acknowledged *Erie* as providing that substantive questions are to be governed by state law in diversity cases, it read *Hanna v. Plumer* as authority to modify the *Erie* doctrine so that application of state or federal law of privilege in diversity cases is a matter of choice, not necessity.[27] In making such a choice where privileged communications are at issue, the Advisory Committee thought that "all significant policy factors need to be considered in order that the choice may be a wise one."[28] The committee rejected arguments supporting adherence to state law and proposed that federal law of privilege should prevail in federal courts. The basis for this proposal included a finding that the substantive aspect of privileged evidence is frequently tenuous. Since state privilege law has traditionally yielded to federal law in federal criminal prosecutions, the committee concluded that the value of state-created privilege is illusory as protection for the relationship involved. For example, in a state with a statutory accountant's privilege, the fact that the client's communication with his accountant might be protected in some proceedings but not in others—and never in federal criminal cases—was viewed as diminishing the value of the privilege to uphold state interest in the relationship involved. The committee further

[22]Proposed Fed. R. Evid. 501, 56 F.R.D. 183, 230 (1972).

[23]*Id.* at 230-61.

[24]*Id.* at 230.

[25]380 U.S. 460 (1965).

[26]304 U.S. 64 (1938).

[27]Proposed Fed. R. Evid. 501 (Advisory Committee's Note), 56 F.R.D. 183, 233 (1972).

[28]*Id.*

concluded that choice of forum is affected by many factors and rejected a suggestion that "forum shopping" would be encouraged by denying recognition to state privilege law.

The Advisory Committee noted that its most radical departure from existing state laws was elimination of the physician-patient privilege, but suggested that the privilege had been essentially eliminated in diversity cases by Federal Rule of Civil Procedure 35.[29] Under this rule, the privilege is waived if a party who is physically examined under court order subsequently deposes the examiner or obtains a copy of his report.

An interesting presentation of the Advisory Committee's rationale for ignoring state law of privilege was presented by Professor Edward Cleary, Advisory Committee Reporter, in a talk before the 1973 Federal Bar Association Conference on the proposed rules.[30]

> One possibility as to what might be done in the way of treating privilege in a set of federal rules is to leave the matter entirely to state law, but this we have never been willing to do in criminal cases or largely in the federal question cases. A second would be to recognize state-created privileges in diversity cases. A third would be to recognize only federally-created privileges, and the committee opted, as you see from the Rules, in favor of this treatment of privileges.
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> [T]he only real question area (of the significance of state law on privilege questions) . . . are the diversity cases, and there, of course, you have an initial problem of whether evidentiary privileges are substance or procedure under *Erie*. . . . It seems difficult to say that a rule of privilege governs so-called primary activity when it doesn't apply in criminal cases. Consequently, the committee simply concluded that there was no point in kidding people if state rules were not going to govern in criminal cases in the federal courts.[31]

In addition to this conclusion—that state privilege rules lose their claim of substance in federal courts since they cannot be applied

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[29]Federal Rule of Civil Procedure 35(b)(2) provides:

> By requesting and obtaining a report of the examination as ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversey, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

[30]Cleary, *Article V: Privileges*, 33 FED. B.J. 62 (1974).

[31]*Id.* at 63-64.

in criminal cases—Professor Cleary's talk dealt summarily with the potential problems of "forum shopping" raised by the Advisory Committee's decision to ignore state privilege law in federal courts. Forum shopping, he pointed out, is the purpose of diversity litigation and should be accepted as its inevitable result.[32]

B. Protection of Specific Relationships

The Advisory Committee-Supreme Court version provided that communications within four specific relationships would be privileged.

1. Lawyer-Client.—Proposed rule 503[33] followed the historic common law approach to the privilege of attorneys as presented

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[32]"If you don't like forum shopping, then the answer, I think, is to simply eliminate diversity jurisdiction, a thing the Congress is not prepared to do." *Id.*

[33]Proposed rule 503 provided:

(a) Definitions. As used in this rule:

(1) A "client" is a person, public officer or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A "lawyer" is a person authorized or reasonably believed by the client to be authorized, to practice law in any state or nation.

(3) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(c) Who may claim the privilege. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communications may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule:

by Dean Wigmore and Professor McCormick.[34] Since the rule contained no definition of "representative of the client," the modern problem of who speaks for the client—and thus who may claim the privilege—when the client is a corporation was left unanswered. This omission was explained in the Advisory Committee's Note as based on the assumption that the matter would be better left to resolution by the courts on a case-by-case basis. Recognizing the wide spectrum of definition possible—from holding that any corporate officer or employee speaks for the client and may therefore invoke the privilege, to the "control group" theory, that only those authorized to seek and act upon legal advice are entitled to claim client status—the Advisory Committee elected to include no definition of the persons within a corporation whose communications to an attorney representing the corporation should be protected.

2. Psychotherapist-Patient.—Proposed rule 504[35] represented a departure from tradition, substituting protection for the rela-

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(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(3) Breach of duty by lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; or

(4) Document attested by lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) Joint clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

Proposed Fed. R. Evid. 503, 56 F.R.D. 183, 235-37 (1972).

[34]McCormick §§ 87-95; Wigmore §§ 2290-2329.

[35]Proposed rule 504 read:

(a) Definitions.

(1) A "patient" is a person who consults or is examined or interviewed by a psychotherapist.

(2) A "psychotherapist" is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or inter-

tionship between psychotherapist and patient for the long-accepted doctor-patient privilege. The proposed rule defined a "psychotherapist" as a person authorized or believed by the patient to be authorized to practice medicine, or a person licensed or certified as a psychologist, while engaged in diagnosis or treatment of a mental or emotional condition, including drug addiction. The Advisory Committee's Note recognized the existence of many state statutes creating a general physician-patient privilege, but concluded that the "exceptions which have been found necessary in order to obtain information required by the public interest or to avoid fraud are so numerous as to leave little if any basis for the privilege."[36]

The Advisory Committee found three instances in which the need for confidentiality in the relation between psychotherapist

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view, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) Who may claim the privilege. The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary.

(d) Exceptions.

(1) Proceedings for hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) Examination by order of judge. If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(3) Condition an element of claim or defense. There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

Proposed Fed. R. Evid. 504, 56 F.R.D. 183, 240-41 (1972).

[36] *Id.* at 242 (Advisory Committee's Note).

and patient is overcome by the importance of disclosure. These were proceedings for hospitalization, examination by order of a judge, and communications relevant to a condition on which a party relies as an element of his claim or defense in litigation.

3. Husband-Wife.—Although retaining the privilege of an accused to prevent his spouse from testifying against him in a criminal proceeding, proposed rule 505[37] departed from traditional modes of expressing the privilege by denying protection for confidential communications within the marital relationship. The Advisory Committee's Note rejected the usual justifications presented for such protection—prevention of marital discord and distaste for required condemnation between spouses.[38] Professor Cleary explained the committee's rationale by suggesting that since the parties are almost certainly unaware of the existence of the privilege, it is unlikely to have a great effect on the marital relationship. "It has been suggested that if this theory of privilege is sound," Professor Cleary observed, "then lawyers' marriages ought to be happier than other people's marriages, because in all of the states they know of the existence of the privilege, but we don't have any evidence to support that view."[39]

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[37]Proposed rule 505 provided:

> **(a) General rule of privilege.** An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.
>
> **(b) Who may claim the privilege.** The privilege may be claimed by the accused or by the spouse on his behalf. The authority of the spouse to do so is presumed in the absence of evidence to the contrary.
>
> **(c) Exceptions.** There is no privilege under this rule (1) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other, or (2) as to matters occurring prior to the marriage, or (3) in proceedings in which a spouse is charged with importing an alien for prostitution or other immoral purpose in violation of 8 U.S.C. § 1328, with transporting a female in interstate commerce for immoral purposes or other offense in violation of 18 U.S.C. §§ 2421-2424, or with violation of other similar statutes.

Proposed Fed. R. Evid. 505, 56 F.R.D. 183, 244-45 (1972).

[38]McCormick § 86; Wigmore § 2228. The Advisory Committee rejected the privilege on this ground:

> The other communications privileges, by way of contrast, have as one party a professional person who can be expected to inform the other of the existence of the privilege. Moreover, the relationships from which those privileges arise are essentially and almost exclusively verbal in nature, quite unlike marriage.

Proposed Fed. R. Evid. 505 (Advisory Committee's Note), 56 F.R.D. 183, 246 (1972).

[39]Cleary, *Article V: Privileges*, 33 Fed. B.J. 62, 67 (1974).

4. Communications to Clergymen.—In proposed rule 506,[40] the Advisory Committee recognized the difficulty of defining a clergyman in view of a lack of licensing or certification procedures, and extended the privilege to a person reasonably believed to be a clergyman by the individual consulting him. Both the clergyman and the communicant could invoke the privilege. Also noted in the committee's commentary is the fact that clergymen often participate in marriage counselling and the treatment of personality problems, matters which "fall readily into the realm of the spirit"[41] and involve considerations comparable to those in the psychotherapist-patient relationship.

C. Special Provisions

Three rules designed to affect all privileged relationships were proposed. These were Rule 511: Waiver of Privilege by Voluntary Disclosure;[42] Rule 512: Privileged Matter Disclosed under Compulsion or Without Opportunity to Claim Privilege;[43] and

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[40]Proposed rule 506 provided:

(a) Definitions. As used in this rule:

(1) A "clergyman" is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

(c) Who may claim the privilige. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary.

Proposed Fed. R. Evid. 506, 56 F.R.D. 183, 247 (1972).

[41]*Id.* at 248 (Advisory Committee's Note).

[42]Proposed rule 511 provided:

A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

Id. at 258.

[43]Proposed rule 512 provided:

Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

Id. at 259.

Rule 513: Comment Upon or Inference from Claim of Privilege; Instruction.[44] These rules adhered to traditional doctrines,[45] terminating a privilege when the holder destroys the protected confidentiality by his own act, providing the remedy of exclusion when disclosure is erroneously compelled, and emphasizing the danger of destroying privilege by innuendo. The Advisory Committee noted that unanticipated situations involving election of privilege are bound to arise and must be left to judicial discretion and professional responsibility on the part of counsel.

D. Reaction to the Proposals

In spite of the Advisory Committee's persuasive commentary and its seven years of preparation, the proposed rules met with swift and vehement reaction, and the privilege section of the rules generated more comment and controversy than any other section. Approximately one-half of the complaints received by the House Criminal Justice Subcommittee related to article V.[46] Scholars questioned the proposed rules on several grounds, including constitutionality, the Advisory Committee's assumption that the value of full disclosure is greater than the social values supported by specific privileges, and relegation of privilege to "procedural" rather than "substantive" status.[47]

Thus rule 501 in its present brief form emerged as the privilege standard of the Federal Rules of Evidence. It differs from the Supreme Court version in that it allows for interpretation of the federal common law on a case-by-case basis, rather than fixing privilege in a statutory codification.[48] The enacted rule also

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[44]Proposed rule 513 provided:

> **(a) Comment or inference not permitted.** The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.
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> **(b) Claiming privilege without knowledge of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.
>
> **(c) Jury Instruction.** Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

Id. at 260.

[45]WIGMORE § 2242. *Cf. id.* §§ 2270, 2337, 2340, 2389.

[46]120 CONG. REC. H12,253 (daily ed. Dec. 18, 1974).

[47]*See, e.g., Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973).

[48]In a December 1975 case involving the husband-wife privilege, the Eighth Circuit held, under rule 501, that "this court, as well as other federal

differs from the proposed rules in that it will allow application of state law in most, if not all, diversity cases.

IV. Indiana Law of Privileged Communications

A. Statutory Privileges

Indiana provides statutory privileges protecting confidential communications of or to attorneys, physicians, clergymen, spouses, accountants, counselors for school systems, newspeople, and psychologists. Indiana Code section 34-1-14-5[49] provides protection for the first four of these. The protection offered to attorneys, physicians, clergy, and spouses is couched in terms of incompetence. An incompetent person is one who is legally ineligible to testify by statutory provision. In spite of the language of section 34-1-14-5, however, Indiana courts have construed the language as conferring privilege, which may be waived.[50] For that reason, the following examination of the specific privileges provided by Indiana law will view these incompetency provisions as privilege.

1. Attorney-Client.—The privilege of an attorney to protect the confidential relationship with his client was recognized at common law in England as early as the 16th century,[51] and may

courts, has the right and responsibility to examine the policies behind the common-law privileges and to alter or amend them when 'reason and experience' so require." United States v. Allery, 526 F.2d 1362 (8th Cir. 1975). The decision expanded the common law exception to the marital privilege which allows testimony when an alleged crime is an offense against a spouse to include testimony about crimes against a child or stepchild of either spouse.

[49]Ind. Code § 34-1-14-5 (Burns 1973) provides:

> **Who are incompetent.**—The following persons shall not be competent witnesses:
>
> First. Persons insane at the time they are offered as witnesses, whether they have been so adjudged or not.
>
> Second. Children under ten [10] years of age, unless it appears that they understand the nature and obligation of an oath.
>
> Third. Attorneys, as to confidential information made to them in the course of their professional business, and as to advice given in such cases.
>
> Fourth. Physicians, as to matter communicated to them, as such, by patients, in the course of their professional business, or advice given in such cases.
>
> Fifth. Clergymen, as to confessions or admissions made to them in course of discipline enjoined by their respective churches.
>
> Sixth. Husband and wife, as to communications made to each other.

[50]Note, *Testimonial Privilege and Competency in Indiana*, 27 Ind. L.J. 256, 257-59 (1952).

[51]

> [A]s testimonial compulsion does not appear to have been generally

have its roots in Roman law, which prohibited an advocate from testifying against his client.[52]

Indiana imposes a statutory duty on an attorney to maintain the confidence of his client,[53] and the Rules for Admission to the Bar and the Discipline of Attorneys provide that upon being admitted to practice law in Indiana an applicant must swear or affirm, "I will maintain the confidence and preserve inviolate the secrets of my client at every peril to myself."[54] In addition, the Indiana Code of Professional Responsibility, in Canon 4, provides that a lawyer must preserve the confidences and secrets of his client and this mandate is supported by a number of ethical considerations which explain the policy underlying the canon.[55]

The Indiana Code of Professional Responsibility does not preclude an attorney from revealing: (1) Confidences or secrets with the consent of the client or clients affected, after a full disclosure to them; (2) confidences or secrets when disclosure is permitted under the disciplinary rules or required by law or court order; (3) the intention of his client to commit a crime and the information necessary to prevent the crime; and (4) confidences or

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> authorized until the early part of Elizabeth's reign, . . . it would seem that the privilege could hardly have come much earlier into existence.

WIGMORE § 2290. The earliest theory of the attorney's exemption from the duty to testify was based on a consideration of the attorney's honor, rather than concern for the rights of the client.

[52]Note, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487 (1928).

[53]IND. CODE § 34-1-60-4 (Burns 1973). "It shall be the duty of an attorney . . . [t]o maintain inviolate the confidence, and, at every peril to himself, to preserve the secrets of his client."

[54]IND. R. ADMISS. & DISCP. 22.

[55]IND. CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 4-1, provides:

> Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

(Footnotes omitted).

secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.[56]

In addition, Indiana Code section 34-1-14-5 provides that an attorney is not a competent witness as to confidential communications received or advice given in the course of his professional business.[57] However, Indiana courts have rejected this language and have held that an attorney is competent, by construing the statute as giving the *client* the right to object to disclosure of confidential communications to the attorney.[58]

Defeasance of the privilege in regard to matters communicated in furtherance of a continuing or future crime was upheld in *United States v. Aldrich*,[59] a 1973 Seventh Circuit case in which an attorney-defendant was permitted to testify as to conversations he had with three co-defendants as part of his own defense in an action for securities and mail fraud. The court, in denying the contention of the co-defendants that the attorney's testimony violated their privilege, held that this exception may be invoked by an attorney where communications relate to criminal or fraudulent acts contemplated by the client, whether the attorney joined in those acts or was ignorant of them. Thus, once the Government had established a prima facie case that the defendants had been involved in frauds, the attorney's testimony regarding communications about those acts was excepted from the privilege.

The principle that a corporation is a client, entitled to the protection of the attorney-client privilege, was established in 1963 by the Seventh Circuit,[60] which held that the privilege is that of the client, regardless of his corporate or noncorporate character, and is "designed to facilitate the administration of justice."[61] A corporation was held to be entitled to the same treatment as any other client, and thus was privileged to protect itself from disclosure of confidential information. Because of the varying and sometimes complex structure of corporate organization, attorneys who are employed by corporate clients may face special problems.

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[56] *Id.*, Disciplinary Rule 4-101(C).

[57] IND. CODE § 34-1-14-5 (Burns 1973).

[58] Key v. State, 235 Ind. 172, 132 N.E.2d 143 (1956); Brown v. Clow, 158 Ind. 403, 62 N.E. 1006 (1902); Pence v. Waugh, 135 Ind. 143, 34 N.E. 860 (1893); Gorney v. Gorney, 136 Ind. App. 96, 181 N.E.2d 779 (1962).

[59] 484 F.2d 655 (7th Cir. 1973). *See also In re* Sawyer, 229 F.2d 805, 808-09 (7th Cir.), *cert. denied*, 351 U.S. 966 (1956), in which the court said, "[T]he rule accepted by all courts today is that a client's communications to his attorney in pursuit of a criminal or fraudulent act yet to be performed is not privileged in any judicial proceeding."

[60] Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963).

[61] *Id.* at 322.

Possible conflicts between an attorney's responsibility to protect client confidentiality and provide maximum legal service on the one hand, and the requirements of scrupulous concern for the law and the rights of the public on the other hand, have been the subject of much analysis in recent years.[62]

In *United States v. Tratner*,[63] the Seventh Circuit held that *in camera* proceedings may be the best method to determine the validity of an attorney's claim to privilege. An attorney-taxpayer in *Tratner* wished to protect the name of the payee on a check drawn on an escrow account kept for his clients. The court held that evidence to support the claim of privilege should be presented *in camera*, before a decision as to the merits of the claim.

Courts and commentators agree that where two parties with a common interest consult the same attorney, their communications are privileged as to third parties.[64] But if a subsequent controversy arises between the original two parties, those communications are not privileged in an action between them.[65] This is in line with the established principle that information shared by third parties is not privileged. Conversations held at the request of the client between an attorney and a third party also fall outside the privilege.[66] As to deceased clients, the privilege may be waived by the decedent's personal representative,[67] and a presumption of waiver allowing an attorney to authenticate a will is drawn from the testator's selection of the attorney as an attesting witness.[68]

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[62]*See, e.g.*, Seitz, *The Attorney-Client Privilege and House Counsel*, 17 IND. ST. B. ASS'N RES GESTAE, Dec. 1973, at 17; Note, *Client Confidentiality and Securities Practice: A Demurrer from the Current Controversy*, 8 IND. L. REV. 549 (1975); Note, *A New Ethic of Disclosure*—National Student Marketing *and the Attorney-Client Privilege*, 48 NOTRE DAME LAW. 661 (1973).

[63]511 F.2d 248 (7th Cir. 1975).

[64]MCCORMICK § 91.

[65]*See* Simpson v. Motorists Mut. Ins. Co., 494 F.2d 850 (7th Cir.), *cert. denied*, 419 U.S. 901 (1974) (communications between a liability insurer and its attorneys in a tort action against an insured were held not privileged in a subsequent action by the insured's assignee against the insurer, where the insurer's attorneys had also been attorneys for the insured in the tort action).

[66]Webster v. State, 302 N.E.2d 763 (Ind. 1973). The court held that refusal to admit testimony by counsel for defendant's brother regarding a conversation about leniency for the brother if he would testify against the defendant was harmless error. In Hineman v. State, 292 N.E.2d 618 (Ind. Ct. App. 1973), the court held that evidence offered by a defendant relating to plea bargaining is inadmissable unless the defendant enters a plea of guilty which is not withdrawn. The *Webster* case established the distinction that evidence of plea bargaining by *witnesses* is admissable.

[67]Morris v. Morris, 119 Ind. 341, 21 N.E. 918 (1889).

[68]Pence v. Waugh, 135 Ind. 143, 34 N.E. 860 (1893). "The testator will be presumed to have acted with a desire to support his sanity and the validity

2. Physician-Patient.—Since there is no common law physician-patient privilege,[69] the Indiana statute[70] is in derogation of the common law and therefore is to be strictly construed.[71] The purpose of the privilege is to encourage free communications between the patient and the physician in order to attain proper treatment, but it is not to be invoked in order to suppress truth,[72] and may be effectively waived by the patient.[73] The leading modern case in Indiana is *Collins v. Bair*,[74] in which the court emphasized that the privilege is not to be distorted by "application in circumstances *where the policy behind the rule is not served*,"[75] declaring that when a litigant places in issue his physical or mental condition by way of complaint, counterclaim, or affirmative defense, he automatically waives the physician-patient privilege. Justice Hunter's opinion in *Collins* makes clear that where the patient has surrendered his claim to privacy by filing suit, he is held to have waived the physician-patient privilege.[76] In an earlier case, the court had found an implied waiver of the privilege where a patient filed a malpractice suit against a physician and testified as to the nature of the treatment received.[77] The *Collins* decision extended this finding of implied waiver to any party filing a suit

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of his will, and that in choosing a witness he intended to waive every obstacle to his competency." *Id.* at 155, 34 N.E. at 863.

[69]Summerlin v. State, 256 Ind. 652, 271 N.E.2d 411 (1971); Collins v. Bair, 256 Ind. 230, 268 N.E.2d 95 (1971); Stayner v. Nye, 227 Ind. 231, 85 N.E.2d 496 (1949); Meyers v. State, 192 Ind. 592, 137 N.E. 547 (1922); Towles v. McCurdy, 163 Ind. 12, 71 N.E. 129 (1904).

[70]IND. CODE § 34-1-14-5 (Burns 1973).

[71]Green v. State, 257 Ind. 244, 274 N.E.2d 267 (1971); Alder v. State, 239 Ind. 68, 154 N.E.2d 716 (1958).

[72]Collins v. Bair, 256 Ind. 230, 268 N.E.2d 95 (1971); Seifert v. State, 160 Ind. 464, 67 N.E. 100 (1903); Penn Mut. Life Ins. Co. v. Wiler, 100 Ind. 92 (1884).

[73]Collins v. Bair, 256 Ind. 230, 268 N.E.2d 95 (1971); Stayner v. Nye, 227 Ind. 231, 85 N.E.2d 496 (1949); Pence v. Myers, 180 Ind. 282, 101 N.E. 716 (1913); Lane v. Boicourt, 128 Ind. 420, 27 N.E. 1111 (1891).

[74]256 Ind. 230, 268 N.E.2d 95 (1971). For a thorough analysis of the case and its implications, see Harvey, Collins v. Bair—*Discovery—Doctor-Patient Privilege—Waiver*, 15 IND. ST. B. ASS'N RES GESTAE, May 1971, at 16.

[75]Collins v. Bair, 256 Ind. 230, 236, 268 N.E.2d 95, 98 (1971) (emphasis in original).

[76]

> Where a party-patient, of his own, does an act which will require disclosure of a condition otherwise protected from disclosure, there would appear to no longer be a basis upon which to allow that party to selectively suppress relevant medical evidence pertaining to the same specific condition.

Id. at 237, 268 N.E.2d at 99.

[77]Lane v. Boicourt, 128 Ind. 420, 27 N.E. 1111 (1891).

wherein his physical or mental condition is at issue.[78] Similarly, by placing his mental capacity at issue in an affirmative defense of insanity, the defendant in *Summerlin v. State*[79] was held to have waived the physician-patient privilege as to his mental condition.

The question of who is a physician has been raised by a number of cases. The Indiana Supreme Court has held that, for the purpose of the statute, a "physician" is a person who has received a degree of doctor of medicine from an incorporated institution, is lawfully engaged in the practice of medicine and thus is licensed by this state to practice medicine.[80] A chiropractor falls within this standard,[81] but a psychologist does not.[82] Persons who are acting as agents of the physician may be protected by the statute, but not third parties who are unconnected with the physician.[83]

Construction of the statutory terms "matters communicated" and "professional business or advice given" was delineated in *Myers v. State*[84] as "information obtained in the sick room, heard or observed by the physician, or of which he is otherwise informed pertaining to the patient and upon which he is persuaded to do some act or give some direction or advice in the discharge of his professional obligations."[85] A doctor may respond to a hypothetical question, based on facts set forth in earlier testimony in the case. Such a response has been held admissible where it is not shown that the physician considered facts other than those presented in the question.[86]

The trend of Indiana cases has been to interpret the statutory physician-patient privilege restrictively rather than permissively,

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[78]*See also* Newkirk v. Rothrock, 293 N.E.2d 550 (Ind. Ct. App. 1973) (a grantor's executor waived the physician-patient privilege by placing the grantor's physical and mental condition in controversy in a suit to set aside a conveyance of property on an allegation of undue influence).

[79]256 Ind. 652, 271 N.E.2d 411 (1971). *See also* Brattain v. State, 225 Ind. 489, 61 N.E.2d 462 (1945); Noelke v. State, 214 Ind. 328, 15 N.E.2d 950 (1938).

[80]William Laurie Co. v. McCollough, 174 Ind. 477, 489, 90 N.E. 1014, 1018 (1910) ("The word 'physician' includes only those who are 'lawfully' engaged in the practice of medicine").

[81]Collins v. Bair, 256 Ind. 230, 268 N.E.2d 95 (1971).

[82]Elliott v. Watkins Trucking Co., 406 F.2d 90 (7th Cir. 1969).

[83]Green v. State, 257 Ind. 244, 274 N.E.2d 267 (1971); Doss v. State, 256 Ind. 174, 267 N.E.2d 385 (1971). *But see* General Accident, Fire & Life Assurance Co. v. Tibbs, 102 Ind. App. 262, 2 N.E.2d 229 (1936) (holding that the privilege does not extend to nurses).

[84]192 Ind. 592, 137 N.E. 547 (1922).

[85]*Id.* at 600, 137 N.E. at 550. *See also* Vaughan v. Martin, 145 Ind. App. 455, 251 N.E.2d 444 (1969).

[86]Robertson v. State, 291 N.E.2d 708 (Ind. Ct. App. 1973); Hauch v. Fritch, 99 Ind. App. 65, 189 N.E. 639 (1934).

providing the patient with limited protection against disclosure of his communications to a physician.[87]

3. Clergyman-Communicant.—Although there is some argument that a clergyman's privilege was recognized during the period before the Restoration, its existence was consistently denied by English courts for two centuries following the Restoration.[88] A presumption of the privilege, favored by instinctive protection of the "confidence of the confessional," can be found in dicta in numerous American cases.[89]

The Indiana statute[90] narrowly defines the subject and the circumstances surrounding material protected by the clergyman-communicant privilege. Only "confessions or admissions" made to clergymen "in the course of discipline enjoined by their respective churches" is shielded from a compulsion to disclose. The statutory language is not definitive and Indiana cases are few and old. The latest, of 1950 vintage,[91] permitted testimony by a minister concerning the mental capacity of a communicant. The court held that such testimony was not privileged since it was not concerned with matters communicated to the clergyman in his clerical capacity. The decision was in accord with an 1881 case[92] in which the court held that communications unrelated to a religious duty or obligation, made to an elder or deacon rather than a pastor, were admissible. Exclusion of communication to a priest was upheld in 1899,[93] when the court found that the information was received by the clergyman in the course of religious activity.

A suggestion that it is the judge who should interpret statutory language and make the determination whether communications to a clergyman occurred in circumstances making it privileged appeared in a recent Massachusetts case[94] which may be analogous to the issue of such interpretation in Indiana.

It has been suggested that cases involving clergymen are more likely to be decided on the basis of the court's policy in regard to the substantive issue, rather than on application of privilege stat-

[87]See Note, *A Look at Indiana Code 34-1-14-5: Indiana's Physician-Patient Privilege*, 8 VALP. U.L. REV. 37 (1973), for an historical perspective of the state's attitude toward protection of physicians' testimony.

[88]WIGMORE § 2394.

[89]*See, e.g.*, Totten v. United States, 92 U.S. 105 (1875); McMann v. SEC, 87 F.2d 377 (2d Cir.), *cert. denied*, 301 U.S. 684 (1937).

[90]IND. CODE § 34-1-14-5 (Burns 1973) provides: "The following persons shall not be competent witnesses . . . Clergymen, as to confessions or admissions made to them in course of discipline enjoined by their respective churches."

[91]Buuck v. Kruckeberg, 121 Ind. App. 262, 95 N.E.2d 304 (1950).

[92]Knight v. Lee, 80 Ind. 201 (1881).

[93]Dehler v. State *ex rel.* Bierck, 22 Ind. App. 383, 53 N.E. 850 (1899).

[94]Commonwealth v. Zezima, 310 N.E.2d 590 (Mass. 1974).

utes.[95] Other questions raised by the absence of recent cases in this state include consideration of increasing activity by clergy as marriage counselors, youth group advisors, and in other capacities where information of potential legal interest may surface. Consideration of legal privilege for clergymen is further complicated by the strong policy of religious freedom in this country. Roman Catholic clergy are enjoined by ecclesiastical statutes from revealing confessional communications. Other clergy, although not supported by such specific orders, have asserted an allegiance to higher authority and may risk contempt charges rather than testify as to confidential communications.[96]

4. Husband-Wife.—The Indiana marital privilege statute[97] protects communications between husband and wife, but courts have found much information passed between spouses to be admissible. For example, in *Richard v. State*,[98] the Indiana Supreme Court held that where the wife refused to answer a question regarding her husband's statement to her, but he failed to object to the question, his failure to object constituted a waiver of his marital privilege. The decision included reference to the fact that the husband had instructed his wife to communicate the statement to a third party, thus negating confidentiality.[99] However, a 1971 Indiana Supreme Court decision[100] relied on the public policy favoring preservation of marital confidences to exclude a husband's testimony that his wife drove the getaway car in a burglary for which the husband was convicted, prompting dissenting Justice Arterburn to question the social purpose of allowing marriage to shield criminals.[101]

Conflicting policies raised by concern for marital confidence, cultural changes in the attitude of society toward both women and the institution of marriage, as well as the need for the fullest possible disclosure in litigation are among considerations which un-

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[95]Kuhlmann, *Communications to Clergymen—When Are They Privileged?*, 2 VALP. U.L. REV. 265 (1968).

[96]W. TIEMANN, THE RIGHT TO SILENCE (1964); Hogan, *A Modern Problem on the Privilege of the Confessional*, 6 LOYOLA L. REV. 1 (1951).

[97]IND. CODE § 34-1-14-5 (Burns 1973) provides:

> The following persons shall not be competent witnesses:
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> . . . .
>
> Sixth: Husband and wife, as to communications made to each other.

[98]319 N.E.2d 118 (Ind. 1974).

[99]*See also* United States v. Moorman, 358 F.2d 31 (7th Cir.), *cert. denied*, 385 U.S. 866 (1966) (holding permission by husband of wife's testimony in their joint defense to be waiver of the marital privilege); Pinkerton v. State, 258 Ind. 610, 283 N.E.2d 376 (1972) (holding husband's appearance before the grand jury not confidential).

[100]Shepherd v. State, 257 Ind. 229, 277 N.E.2d 165 (1971).

[101]*Id.* at 235, 277 N.E.2d at 169.

derlie the evolution of marital privilege law. Early Indiana courts recognized the common law doctrine that the wife's identity merged with her husband. Thus, before 1881, one spouse could testify for or against the other only in a case of assault and battery, or similar offense, committed against the witness spouse.[102] In 1914 an Indiana court held that only communications having a necessary relation to or dependent on the mutual trust and confidence of a husband and wife would be protected,[103] and in 1926, "Husbands and wives, in this jurisdiction, may testify for or against each other in all cases, except as to confidential communications."[104]

The difficulty in deciding when the privilege will attach lies in determining what is a "confidential communication" worthy of protection in order to protect the institution of marriage. Indiana courts have not held that every act in the presence of the spouse is confidential, and a clear definition of marital confidentiality does not emerge.[105] This lack of clarity may be further complicated by continuing changes in the value placed upon the relationship of marriage.[106]

5. Accountant-Client.—There is no common law privilege shielding either an accountant or his client from a demand to reveal confidential information in court;[107] the privilege is a recent legislative creation. The Indiana statute[108] granting an accountant

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[102]For the historical development from total incompetency of spouse to marital privilege in Indiana, see Note, *Testimonial Privilege and Competency in Indiana*, 27 IND. L.J. 256, 269 (1952); Note, *Spouse as Complaining Witness in Non-Violence Criminal Actions*, 26 NOTRE DAME LAW. 90 (1950).

[103]Gifford v. Gifford, 58 Ind. App. 665, 107 N.E. 308 (1914).

[104]Vukodonovich v. State, 197 Ind. 169, 150 N.E. 56 (1926).

[105]Smith v. State, 198 Ind. 156, 152 N.E. 803 (1926); Beyerline v. State, 147 Ind. 125, 45 N.E. 772 (1897).

[106]For a discussion of competency in filiation and bastardy proceedings in Indiana, see Note, *Testimonial Privilege and Competency in Indiana*, 27 IND. L.J. 256, 270-71 (1952).

[107]WIGMORE § 2286, at 530 n.13.

[108]IND. CODE § 25-2-1-23 (Burns 1974) provides:

> **Privileged communications between accountant and client.**—A certified public accountant or a public accountant or an accounting practitioner, or any employee, shall not be required to disclose or divulge information of which he may have become possessed, relative to and in connection with any professional service as a certified public accountant or a public accountant or accounting practitioner. The information derived from or as the result of such professional services shall be deemed confidential and privileged: Provided, That nothing herein shall be construed as prohibiting a certified public accountant or a public accountant from disclosing any data required to be disclosed by the standards of the profession in rendering an opinion on the presentation of financial statements, or in making disclosure where said financial statements, or the professional services of the accountant pertaining thereto are contested.

privilege is one of seventeen such statutes now in effect in United States jurisdictions.[109] Justification of statutory testimonial privilege for accountants is sparse,[110] and criticism of such legislation includes assertions that the benefits to be gained from the privilege are minimal in relation to the consequential injury to effective administration of justice.[111]

The privilege in Indiana is limited to communications made to the accountant in the course of his professional service, and the privilege is waived when the information is material to the defense of an action against an accountant.

No Indiana cases applying the privilege have been reported. Cases from other jurisdictions, however, indicate a tendency to construe the accountant's privilege narrowly.[112] Where federal law is at issue, the existence of a state privilege has not controlled.[113] This denial of recognition to state law was emphasized in regard to records relevant to federal income tax returns by the United States Supreme Court in *Couch v. United States*,[114] in which the Court stated explicitly that there is no justification for invocation

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IND. CODE § 25-2-1-22 (Burns 1974) provides:

> **Work product of accountant—Ownership—Restrictions on transfer.**—All statements, records, schedules, working papers and memoranda made by a certified public accountant or public accountant or accounting practitioner incident to or in the course of professional service to clients by such accountant, except reports submitted by a certified public accountant or public accountant or accounting practitioner to a client, shall be and remain the property of such accountant, in the absence of an express agreement between such accountant and client to the contrary. No such statement, record, schedule, working paper or memorandum shall be sold, transferred, or bequeathed, without the consent of the client or his personal representative or assignee, to anyone other than one or more surviving partners or new partners of such accountant.

[109]*See* Note, *Privileged Communications—Accountants and Accounting—A Critical Analysis of Accountant-Client Privilege Statutes*, 66 MICH. L. REV. 1264 (1968). The author presents a comparative analysis of the extent of the privilege granted by each jurisdiction's statute.

[110]WIGMORE § 2286.

[111]Note, *Evidence—Privileged Communications—Accountant and Client*, 46 N.C.L. REV. 419, 427 (1968).

[112]United States v. Bowman, 358 F.2d 421 (3d Cir. 1966); Rubin v. Katz, 347 F. Supp. 322 (E.D. Pa. 1972). Both cases strictly construe the Pennsylvania statute, focusing on exceptions to the privilege contained in the statutory language and holding that no extension beyond that language need be made.

[113]Baylor v. Mading-Dugan Drug Co., 57 F.R.D. 509, 511 (N.D. Ill. 1972). The court stated, "It is this court's opinion that, as a matter of policy, states should not be permitted to decide for federal courts when they must refrain from hearing useful testimony in matters involving federal law."

[114]409 U.S. 322 (1973).

of an accountant privilege.[115] *Couch* involved a plaintiff who gave business records to an accountant for preparation of tax returns. The Internal Revenue Service summoned those records and the plaintiff asserted fourth and fifth amendment protection. The Court held that when the plaintiff surrendered possession of the records, she was aware that the accountant would disclose information in those records when he prepared the tax return, and there could be no legitimate expectation of constitutional protection. The Court did not preclude a claim of privilege by an accountant's client if the client himself can claim constructive possession of records *temporarily* held by the accountant.[116] Justice Douglas, dissenting, supported the concept of an accountant-client privilege,[117] and Justice Marshall, also dissenting, suggested that a state statute granting an accountant privilege would have been relevant.[118]

Where an accountant is also an attorney, he must show that the matters he seeks to protect were communicated to him in his capacity as a legal advisor[119] if he wishes to claim the attorney-client privilege. Such an assertion may be made only where the attorney-accountant is providing legal advice, rather than merely rendering accounting services.[120] The burden of proof to establish

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[115] *Id.* at 335. The Court noted that "no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases." *See also* United States v. House, 380 F. Supp. 1403 (M.D. Pa. 1974).

[116] Couch v. United States, 409 U.S. 322, 333 (1973).

[117]

> The accountant, an agent for a specified purpose—*i.e.*, completing the petitioner's tax returns—bore certain fiduciary responsibilities to petitioner. One of these responsibilities was not to use the records given him for any purpose other than completing these returns. Under these circumstances, it hardly can be said that by giving the records to the accountant, the petitioner committed them to the public domain.

Id. at 340.

[118]

> It would be relevant to a decision about the expectation of privacy that an accountant-client privilege existed under local law, but not determinative. Petitioner disclaimed reliance on such a privilege . . . . But I would think that, privileged or not, a disclosure to an accountant is rather close to disclosure to an attorney.

Id. at 350-51.

[119] United States v. Brown, 349 F. Supp. 420 (N.D. Ill. 1972).

[120] United States v. Schmidt, 360 F. Supp. 339 (M.D. Pa. 1973). "[W]hat is vital to the assertion of the privilege by an accountant employed by an attorney is that he assist in providing legal advice rather than merely rendering accounting services, and the specific nature of the proponent's role is to establish that the accountant's role is essentially consultive." *Id.* at 347 (footnote omitted).

an attorney-client rather than an accountant-client relationship is on the party who resists disclosure.[121]

The sparseness of diversity cases involving the accountant privilege leaves this area of the law unsettled. Only in one case of diversity jurisdiction has a federal court recognized a state statute as controlling, and the court failed to give the basis of its holding.[122]

Federal Rule of Civil Procedure 26(b)(4)(B)[123] is, of course, available to an accountant who is retained as an expert for litigation.[124] The rule requires a showing of exceptional circumstances to compel discovery from an expert who is not expected to be called as a witness at trial.

6. School Counselors.—Indiana school counselors are privileged by statute[125] from revealing confidential communications with pupils. No similar privilege is granted to teachers.

It has been suggested that four questions which a model statute on counselor-student privilege should answer are: (1) Who is a counselor? (2) What communications are privileged? (3) Who may waive the privilege? (4) In what proceedings does the privilege apply?[126] The Indiana statute does not meet these standards. The statute defines a counselor as one so appointed or designated by the "proper officers" of a school system. In the absence of

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[121]United States v. Gurtner, 474 F.2d 297 (9th Cir. 1973).

[122]Lukee Enterprises v. New York Life Ins. Co., 52 F.R.D. 21 (D.N.M. 1971).

[123]FED. R. CIV. P. 26(b)(4)(B) provides:

> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Rule 35(b) pertains to examination by a physician pursuant to court order.

[124]*See, e.g.*, Inspiration Consol. Copper Co. v. Lumberman's Mut. Cas. Co., 60 F.R.D. 205 (S.D.N.Y. 1973)

[125]IND. CODE § 20-6-20-2 (Burns 1975) provides:

> **Immunity of counselors from disclosing privileged or confidential communications.**—Any counselor duly appointed or designated a counselor for the school system by its proper officers and for the purpose of counseling pupils in such school system shall be immune from disclosing any privileged or confidential communication made to such counselor as such by any pupil herein referred to. Such matters so communicated shall be privileged and protected against disclosure.

[126]Note, *Testimonial Privileges and the Student-Counselor Relationship in Secondary Schools*, 56 IOWA L. REV. 1323, 1345 (1971). For a further study of the questions raised by such a statute, see Note, *An Analysis of the 1972 South Dakota Counselor-Student Privilege Statute*, 19 S.D.L. REV. 378 (1974).

case law, one may only speculate about the definition of "proper officers." No court has determined if a teacher assigned to discuss problems with students is a "designated" counselor, or if information revealed in such a discussion is privileged.[127] The Indiana statute does not deal with the types of communications to be protected, the right of waiver, nor the proceedings covered.

Since testimonial privileges are designed to protect the confidentiality of a particular relationship and should be invoked by the person intended to be protected,[128] it might be concluded that the right to waiver should adhere to the student. However, since students may well be minors, questions of legal capacity and parental rights arise. Also to be considered is the possibility that disclosure, or threat of disclosure, to parents may be a breach of confidentiality sufficient to impair the relationship the privilege is designed to protect.

7. Journalists.—Although no common law privilege for newsmen exists,[129] the professional reporter has proclaimed the right to protect his sources,[130] and a number of jurisdictions, including Indiana, have passed statutes conferring such a privilege.[131] Indiana's statutory provision protecting newsmen's sources of information[132] has been tested in two cases involving the same occur-

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[127]For a discussion of privileged communications to a social worker, see Annot., 50 A.L.R.3d 563 (1973).

[128]WIGMORE § 2196.

[129]*Id.* § 2286; People v. Sheriff of New York County, 269 N.Y. 281, 199 N.E. 415 (1936).

[130]*See, e.g.*, Beaver, *The Newsman's Code, The Claim of Privilege and Everyman's Right to Evidence*, 47 ORE. L. REV. 243, 244 n.2 (1968).

[131]Note, *The "Shield" Statute: Solution to the Newsman's Dilemma?*, 7 VALP. U.L. REV. 235, 237 n.22 (1973).

[132]IND. CODE § 34-3-5-1 (Burns Supp. 1975) provides:

> **Newspapers, television and radio stations—Press associations—Employees and representatives—Immunity.**—Any person connected with, or any person who has been so connected with or employed by, a newspaper or other periodical issued at regular intervals and having a general circulation, or a recognized press association or wire service, as a bona fide owner, editorial or reportorial employee, who receives or has received income from legitimate gathering, writing, editing and interpretation of news, and any person connected with a licensed radio or television station as owner, official, or as an editorial or reportorial employee who receives or has received income from legitimate gathering, writing, editing, interpreting, announcing or broadcasting of news, shall not be compelled to disclose in any legal proceedings or elsewhere the source of any information procured or obtained in the course of his employment or representation of such newspaper, periodical, press association, radio station, television station, or wire service, whether published or not published in the newspaper or periodical, or by the press association or wire

rence.[133] The court held in both cases that the privilege protects only the newsman and cannot be invoked by the person who communicated with the reporter. Thus, the defendant could not bar an admission he made to a newspaper reporter he had summoned to his cell.

Existence of a journalists' privilege under the first amendment was assumed by many until the 1972 United States Supreme Court decision in *Branzburg v. Hayes*.[134] In a 5-4 decision, the Court held that newsmen are not exempt under the first amendment from the normal duty to appear and testify before a grand jury and to answer questions relevant to a criminal investigation. Jurisdictions with so-called "shield statutes" have construed the protection provided both restrictively and liberally,[135] and some journalists have questioned the adequacy of such statutes to protect freedom of the press.[136]

8. Psychologists.—A privilege for communications between psychologists and their clients was enacted in Indiana in 1969,[137] after the court in *Elliott v. Watkins Trucking Co.*[138] made it clear that a psychologist does not qualify for privilege as a "physician." No cases have been reported under the statute.

Little common law protection for psychologists' communications can be documented,[139] but the American Psychology Association endorses Ethical Standards for Psychologists which are clear in their demand for protection of the client's confidentiality.[140] Overlap between the professional pursuits of psychiatrists, who

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service or broadcast or not broadcast by the radio station or television station by which he is employed.

[133]Hestand v. State, 257 Ind. 191, 273 N.E.2d 282 (1971); Lipps v. State, 254 Ind. 141, 258 N.E.2d 622 (1970).

[134]408 U.S. 665 (1972).

[135]*See* Note, *supra* note 131, at 244.

[136]*See, e.g.*, NEWSWEEK, Jan. 15, 1973, at 47.

[137]IND. CODE § 25-33-1-17 (Burns 1974) provides:

> **Privileged communications between psychologists and clients.**—No psychologist certified under the provisions of this act [25-33-1-1—25-33-1-17] shall disclose any information he may have acquired from persons with whom he has dealt in his professional capacity, except under the following circumstances: (1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of said homicide; (2) in proceedings the purpose of which is to determine mental competency, or in which a defense of mental incompetency is raised; (3) in actions, civil or criminal, against a psychologist for malpractice; (4) upon an issue as to the validity of a document as a will of a client; and (5) with the expressed consent of the client or subject, or in the case of his death or disability, of his legal representative.

[138]Elliott v. Watkins Trucking Co., 406 F.2d 90 (7th Cir. 1969).

[139]*But see* State v. Evans, 104 Ariz. 434, 454 P.2d 976 (1969).

[140]AMERICAN PSYCHOLOGY ASS'N, ETHICAL STANDARDS FOR PSYCHOLOGISTS

are physicians, and psychologists, who are not, has been blamed for some confusion about the function of psychologists and for their rare appearance in legal proceedings.[141] As this confusion is dissipated in both the public and the lawyers' view, more cases arising from this statute may be reported.[142]

An interesting problem, which has not yet been litigated, concerns the difficulty of applying protection to information revealed in group therapy sessions.[143] Since the presence of third parties has been construed as waiver and thus a bar to assertion of privilege for communications with professionals, justification of privilege for fellow members of a group therapy session would require that each member of the group be viewed as "professionalized" during therapy sessions. Another difficulty seen with statutes such as Indiana's is that the grant of privilege to psychologists and psychiatrists does not extend the privilege to all bona fide psychotherapists.[144] Psychiatric social workers, for example, are not protected by testimonial privilege in this state.[145]

B. The Future: A Proposal

The refusal of Congress to pass a version of article V for the Federal Rules of Evidence which included a list of carefully defined privileges, and the enactment, instead, of a rule on privileges which calls on the courts to interpret principles of the common law "in the light of reason and experience," is a significant signpost for one seeking the directions in which state law of privileged communications is likely to develop. The Federal Rules of Evidence were intended to provide a model to be copied by the states, as were the Federal Rules of Civil Procedure.[146] Thus Indi-

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(1975). Principle 6 provides: "Safeguarding information about an individual that has been obtained by the psychologist in the course of his teaching, practice, or investigation is a primary obligation of the psychologist." *Id.* at 4.

[141]Levitt, *The Psychologist: A Neglected Legal Resource*, 45 IND. L.J. 82 (1969).

[142]For a survey of this privilege in all jurisdictions, see Annot., 44 A.L.R.3d 24 (1972).

[143]Note, *Group Therapy and Privileged Communication*, 43 IND. L.J. 93 (1967).

[144]Louisell, *The Psychologist in Today's Legal World: Part II*, 41 MINN. L. REV. 731 (1957); Note, *The Psychotherapists' Privilege*, 12 WASHBURN L.J. 297 (1973).

[145]A bill which would have created a state board of examiners in social work and, *inter alia*, provided a privilege for communications with social workers, was introduced in the 1976 General Assembly, but died in the Committee on Public Health, Welfare and Pensions.

[146]Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125 (1973).

ana law of privilege may soon be reconsidered and a proposal for new Indiana rules of evidence is not unlikely.

Indiana's privilege law needs reorganization and clarification. The language of the present statute covering attorneys, physicians, clergymen, and husband-wife relationships is not in consonance with judicial interpretations that it is a privilege, rather than a competency, statute. Although the statute speaks of "who is incompetent," courts have held that it provides protection for confidential communications rather than a prohibition of testimony by those who are termed incompetent. The privilege statutes, covering accountants, counselors, journalists, and school counselors, are scattered throughout the Code and thus are difficult to find.[147] One method of reorganization would be recodification, compiling a list of specific privileges to be established and including definitions of who may claim and who may waive privileges, as well as a description of the communications to be protected.

Examination of the federal rule of privilege may suggest a different path, however. The approach taken by the federal rule—reliance on constitutional provisions and judicial discretion to protect testimony which should not be compelled in court—provides a statutory model which Indiana and other states should study before embarking on recodification of evidence rules.

Reliance upon judicial discretion in determining whose testimony should be privileged, rather than attempting to codify a series of special professional privileges, is supported by Professor McCormick:

> Privilege paints with a broad brush. Reconciling interests in privacy and confidentiality with the needs of litigants is not readily achieved in terms of broad categories; it calls for the finer touch of the specific solution. A tool already at hand, though perhaps largely unrecognized, consists of recognizing standing on the part of the possessor of information to question the legitimacy of need for it in litigation, i.e., to raise issues of relevancy in the broad sense . . . . Relevancy itself, of course, contemplates a process of weighing, and inevitably the judge must be accorded a substantial measure of discretion.[148]

This judicial discretion has been called for on the federal level by rule 501, and there are good reasons why the standard should be uniform in all proceedings, both federal and state. The need for

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[147] *See* WIGMORE § 2286, at 64 (Supp. 1975) (Indiana is not listed as having an accountant's privilege, presumably because the editors did not find it).

[148] MCCORMICK § 77, at 159-60 (footnotes omitted).

uniformity in all courts is manifest if one reviews the reason for the existence of privileges:

> Their sole warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.[149]

If laws of privilege are intended to foster those relationships which society wishes to protect, it is clear that only uniform laws can accomplish that purpose.[150]

Privilege law that differs from one jurisdiction to another or from one proceeding to another may foster misleading assumptions. Confidentiality is often assumed in a professional relationship.[151] This expectation may be based on custom, a general concept of professional ethics, or ephemeral beliefs in the honor and integrity of the professional viewed as confidant. The public, as well as many professionals, is often unaware that the law may require testimony in which confidences will be divulged. Many professionals, including attorneys, physicians, school counselors, and others—some of whom are and some of whom are not covered by protective statutes in this or other states—assert that they cannot establish the kind of relationship they need to help their patients, clients, students, and congregants unless they can assure confidentiality to those with whom they communicate. Yet, in fact, virtually no professional can be certain that the law will protect his confidence in any judicial proceeding in which he may be called upon to testify. Even in jurisdictions where statutory protections exist, exceptions poke holes in the umbrella under which the professional and those who communicate with him are standing; the umbrella may disappear entirely if they find themselves subject to the jurisdiction of a court which does not recognize the statute.

Because statutory protection of confidentiality is not uniform, a professional may be called upon to assure his client that he can guard the confidence of their communications in most state courts, in some federal civil proceedings, but never in a federal criminal case. It is doubtful that the client will find much comfort in such qualified assurance. One may also question whether clients or patients would find comfort if informed that their confidences will

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[149] *Id.* § 72. *Cf.* McMann v. SEC, 87 F.2d 377 (2d Cir.), *cert. denied*, 301 U.S. 684 (1937); WIGMORE § 2192.

[150] "If a journalist's privilege is to encourage prospective informants in this day of multi-jurisdictional events and media, it must assure confidentiality in all jurisdictions." Rothstein, *supra* note 146, at 135.

[151] *See generally* R. SLOVENKO, PSYCHOTHERAPY, CONFIDENTIALITY, AND PRIVILEGED COMMUNICATION (1966).

no longer be privileged if they should elect to bring a malpractice action against the attorney, psychologist, or physician in whom they have placed their trust.

Do relationships between professionals and their clientele really depend upon the protection of law? Is freedom of the press, for example, dependent on the protection of journalists' sources afforded by statutes such as Indiana Code section 34-3-5-1? One observer has noted little proof that the *New York Times*, published in a state where the journalists' privilege is not recognized, is less successful in getting news than newspapers in states where journalists are protected by law.[152]

The case for establishment of relationships based on legal protection of confidentiality is weak. Relationships are more likely to be based on confidence in the professional consulted and reliance on the ethical standards of the group to which he belongs. Most clergymen know little about their legal rights,[153] and few laymen question them on the matter. Those who seek clerical counsel rely on a clergyman's adherence to ethical and religious standards of integrity. Similar reliance—on personal and professional standards of integrity—supports the trust a patient places in his physician, the client in his attorney, or any person seeking help from a professional trained to give such aid.[154] In the husband-wife relationship, as pointed out by Professor Cleary,[155] there is little or no evidence to suggest that familiarity with the law of marital privilege breeds wedded bliss.

The need for confidentiality in the psychotherapeutic relationship is apparent. It is based on two principles: (1) the interests of society are served when persons with mental problems are encouraged to seek help, and (2) persons *will* be deterred from seeking help unless they are assured of confidentiality.[156] Statu-

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[152]DeParcq, *The Uniform Rules of Evidence: A Plaintiff's View*, 40 MINN. L. REV. 301, 323 n.77 (1956).

[153]*See generally* W. TIEMANN, THE RIGHT TO SILENCE (1964).

[154]Physicians are bound by the Oath of Hippocrates:

> Whatsoever things I see or hear concerning the life of men, in my attendance on the sick or even apart therefrom, which ought not to be noised abroad, I will keep silence thereon, counting such things to be as sacred secrets.

Rules of conduct and codes of professional responsibility are also promulgated by professional organizations such as the American News Guild, the American Institute of Certified Public Accountants, the American Personnel and Guidance Association and other professional associations. *E.g.*, AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, CODE OF PROFESSIONAL ETHICS (1974).

[155]Cleary, *Article V: Privileges*, 33 FED. B.J. 62, 67 (1974).

[156]Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 WAYNE L. REV. 609, 618 (1964).

tory protection for authorized physicians and licensed psychologists does not, however, protect all bona fide professionals engaged in psychotherapy. Certified social workers, teachers, and others engaged in counselling must also establish environments of trust if they are to be effective.

Privilege law based on basic concepts of the values to be fostered is best suited to protect important relationships. More than half a century ago, Professor Wigmore set out four fundamental conditions necessary to establish a privilege against disclosure of communications:

> 1) The communications must originate in a *confidence* that they will not be disclosed.
>
> 2) This element of *confidentiality* must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> 3) The *relation* must be one which in the opinion of the community ought to be seduously *fostered.*
>
> 4) The *injury* that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[157]

These conditions, along with considerations of relevancy, offer a foundation on which to build specific claims of privilege. It is not necessary to grant privileges to certain named interests in order to insure the rights and values society wishes to protect.

A proposal that Indiana avoid codifying privileges for specific professional groups is certain to meet with strong reaction. Speaking of the proposed federal rules, Advisory Committee Reporter Cleary said:

> If you want to get into a difficult undertaking sometime, try to draft a set of rules on privileges. It has, I think, more emotion wrapped up in it than all the rest of the law of evidence put together.
>
> . . . [M]any of the people who are interested in having privileges are extraordinarily well organized.
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> . . . This is where questions of prestige and convenience are laid on the line, frequently involving organizations which are very effective in dealing with legislatures.[158]

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[157]WIGMORE § 2285. For a modern case relying on this text, see Humphrey v. Norden, 79 Misc. 2d 192, 359 N.Y.S.2d 733 (Family Ct., Queens Cty. 1974), in which the court found that a claim of privilege involving communications to a social worker failed to meet the fourth test.

[158]Cleary, *supra* note 155, at 62.

It is important to bear in mind, however, that considerations of privilege law involve a balancing of interests—the rights of one party balanced against the rights of another party, the rights of the public balanced against the rights of individuals, and the value of protecting privacy weighed against the need for disclosure in a judicial proceeding.

The difficulty with codification of privilege for certain specific groups is not that too many are protected, but that too many may *not* be protected. Present Indiana statutes protect the relationship between husband and wife, for instance, but provide no privilege between parent and child. Such a distinction is difficult to justify, as are omissions of protection for other significant relationships. A functional approach, considering relevancy and the four Wigmore standards, can protect essential confidences better than grants of privilege to certain named relationships.

Indiana should discard its attempt to codify those relationships which it wishes to protect and consider, instead, a single rule of privilege based on judicial discretion exercised "in the light of reason and experience."

AUDREY GROSSMAN

The Taxation of Costs in Indiana Courts

I. Introduction

Costs that an unsuccessful party must pay his opponent in litigation are not initially of great concern to attorneys or litigants. All too often, however, an unsuccessful litigant discovers with dismay that the costs taxed[1] against him are not an incidental expense but a major one. Further, attorneys are often unsure which of the other party's expenses their clients may be required to pay if unsuccessful in court. This is not surprising since there are no clear statutory or case law guidelines in the area, and the results of a questionnaire[2] sent to circuit courts reveal a wide variation even among counties in Indiana as to what items are included.

This Note will present an overview of the costs of litigation in Indiana—those chargeable against the losing party and those for which parties are responsible themselves. Unfortunately, in many areas it was difficult and sometimes impossible to determine from statutes, case law and secondary sources the extent to which certain items are allowable and to whom. In these areas, the results of the court questionnaire clarified actual practices to some extent. But the lack of county-to-county uniformity serves to emphasize the ambiguity and lack of guidance given by statute. Nowhere in the Indiana Code is there a definition of costs or a list of the items which may be charged to an unsuccessful litigant. Case law is not particularly helpful on the subject, although some old cases have discussed certain aspects of costs.[3]

The conclusions and suggestions of this Note were reached after discussions with attorneys and judges as well as a somewhat dissatisfying attempt to find order in the Indiana law on the subject of costs.

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[1]The term "taxation" when used in connection with costs means the "process of ascertaining and charging up the amount of costs in an action to which a party is legally entitled, or which are legally chargeable." Black's Law Dictionary 1631 (rev. 4th ed. 1968). It is frequently used, and is used in this Note, to refer to the process of charging to the losing party in litigation the costs expended by the prevailing party. As will be seen, the major problem in the procedure is to decide which expenses are "taxable" costs—that is, which are allowed to be assessed against the losing party.

[2]For a discussion of the questionnaire sent to the circuit courts, see note 29 *infra* and accompanying text. A sample questionnaire, with compiled results, is set forth as an Appendix to this Note.

[3]For a discussion of the attempts to define costs, see pp. 682-83 *infra*.

II. Bases for Awarding Costs

Since costs were not awarded at common law, the courts' authority to award them is not inherent but must come from statute.[4] Indiana Code section 34-1-32-1 provides the broad statutory basis for awarding costs: "In all civil actions, the party recovering judgment shall recover costs, except in those cases in which a different provision is made by law."[5] Trial Rule 54(D) contains almost identical language,[6] but adds a provision giving the court discretion whether to award costs if some other provision of law is applicable.[7] Thus, in the great majority of cases, the court's final disposition on the merits determines which party is to receive costs.

There are statutory minimum recoveries which must be satisfied before a prevailing party can recover his costs from his opponent. In contract actions in circuit and superior courts, if a plaintiff has a judgment for less than $50, his opponent recovers costs unless the recovery has been reduced below $50 by a setoff or counterclaim of the defendant, in which case the successful party recovers costs.[8] In non-contract actions for damages, if a plaintiff recovers less than $5 in damages, "he shall recover no more costs than damages, except in actions for injuries to character and false imprisonment, and where the title to real estate comes in question."[9]

There are many special cost provisions included in rules and statutes, which prevail over the general rule as to costs as discussed in the first paragraph of this section. If a plaintiff takes a voluntary dismissal without prejudice under Trial Rule 41(D), he must, if ordered to do so by the court, pay the costs of that action before being able to file a second action involving the same claim against the same defendant.[10]

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[4]State v. Holder, 260 Ind. 336, 295 N.E.2d 799 (1973); Taylor v. Strayer, 167 Ind. 23, 78 N.E. 236 (1906); Stayner v. Bruce, 123 Ind. App. 467, 110 N.E.2d 511 (1953).

[5]Ind. Code § 34-1-32-1 (Burns 1973).

[6]"Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs in accordance with any provision of law . . . ." Ind. R. Tr. P. 54(D).

[7]*Id.*

[8]Ind. Code § 34-1-32-2 (Burns 1973).

[9]*Id.* § 34-1-32-3.

[10]*See* State v. Holder, 260 Ind. 336, 295 N.E.2d 799 (1973) (Prentice, J., concurring); Zuelly v. Casper, 37 Ind. App. 186, 76 N.E. 646 (1906). The court's rationale in *Zuelly* was that the second action is presumed to be vexatious. In *Holder*, both Justice Prentice, concurring, 260 Ind. at 348, 295 N.E.2d at 801, and Chief Justice Arterburn, dissenting, *id.* at 340, 295 N.E.2d

Trial Rule 53.4 provides that a party requesting a continuance is liable to pay the expenses of the other parties caused by the motion if the court so orders.[11] The court has great discretion in awarding such expenses, and can even penalize a party for his attorney's actions. In *Brutus v. Wright*,[12] the Indiana Court of Appeals approved the trial court's order to the appellant to pay the appellee's expenses caused by a continuance when appellant's attorney withdrew his appearance shortly before the hearing without notifying the court. The appellant knew of the withdrawal but also did not notify the court. The court of appeals held that Trial Rule 53.4 authorizes such an award and that the act of an attorney is the act of the client. If the other party's behavior has necessitated a continuance, however, the moving party will not be liable for the former's expenses.[13]

Another special cost provision is found in Trial Rule 56(G). It provides that if a court finds affidavits presented in a motion for summary judgment are in bad faith or for delay, the court shall order the offending party to pay the other party his reasonable expenses caused by the filing of the affidavit, including reasonable attorney fees.[14] The Indiana Court of Appeals commented in *Donat v. Indiana Business & Investment Trust*[15] that the rule "should be strictly enforced to preserve the intent and purpose of the summary judgment proceeding,"[16] and presumably to avoid excessive expenses to the other party.

Where there are multiple parties or issues, a statute provides that each party can recover costs for the issues decided in his favor.[17] For example, in *Columbia Realty Corp. v. Harrelson*,[18] the trial court erroneously assessed costs for the whole action against appellant Columbia, even though it had been a co-defendant with Harrelson on a cross-claim by another defendant. The case was remanded for an apportionment of costs between the co-defendants on that issue.

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at 802, stated that Trial Rule 41(A)(2) gives courts discretion to award even attorney's fees in appropriate cases of voluntary dismissal to avoid inequities to the other party.

[11] *Cf.* Holzman v. Hibben, 100 Ind. 338 (1884); Mitchell v. Stephens, 23 Ind. 466 (1864).

[12] 324 N.E.2d 165 (Ind. Ct. App. 1975).

[13] IND. R. TR. P. 53.4.

[14] *Id.* 56(G).

[15] 147 Ind. App. 276, 259 N.E.2d 428 (1970).

[16] *Id.* at 278-79, 259 N.E.2d at 429.

[17] IND. CODE § 34-1-32-5 (Burns 1973).

[18] 293 N.E.2d 804 (Ind. Ct. App. 1973).

A final special cost provision is found in Indiana Code section 34-1-32-6.[19] If a plaintiff could have joined several actions he had against the same defendant but did not do so, the plaintiff is allowed to recover costs in only one action, unless different rights or interests are affected.

III. Items Allowed as Costs in Indiana Trial Courts

The term "costs" has not been conclusively defined by Indiana courts, nor has it been defined in any of the statutes or rules already discussed. Many cases have said what costs are not,[20] but none have enumerated the expenses chargeable as costs. An early definition of costs was given in *Alexander v. Harrison*.[21]

> The word "costs" is a word of known legal signification. It signifies, when used in relation to the expense of legal proceedings, the sums prescribed by law as charges for the services enumerated in the fee bill.[22]

A more recent definition was given in *State v. Holder*.[23] "'[C]osts' . . . concerns only those usual and ordinary expenses of a trial which are prescribed by statute to be paid to the court."[24] It is unclear whether the court intended this definition to define costs for all purposes, because the action was an eminent domain proceeding and the court was interpreting the cost provision of the Eminent Domain Act.[25] However, the court referred to the definition as the "ordinary sense" of the word costs,[26] so it may have been intended to apply to all actions. Neither definition is very enlightening. Both are very narrow definitions and would necessarily exclude deposition costs, which are paid to the re-

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[19] Ind. Code § 34-1-32-6 (Burns 1973) provides:

> When the plaintiff shall, at the same court, bring several actions against the defendant, upon demands which might have been joined in one [1] action, he shall recover costs only in one [1] action, unless it shall appear to the court that the actions affect different rights or interests, or other sufficient reasons exist why the several demands ought not to have been joined in one action.

[20] *See, e.g.*, Saint Joseph's College v. Morrison, Inc., 302 N.E.2d 865 (Ind. Ct. App. 1973) (attorney fees); State *ex rel.* Friedman v. Freiberg, 70 Ind. App. 1, 122 N.E. 771 (1919) (attorney fees); Alexander v. Harrison, 2 Ind. App. 47, 28 N.E. 119, 120 (1891) (officer's fees in serving out-of-county witnesses). *But see* discussion of attorney fees at pp. 688-91 *infra*.

[21] 2 Ind. App. 47, 28 N.E. 19 (1891).

[22] *Id.* at 48, 28 N.E. at 119, *quoting from* Apperson v. Mutual Benefit Life Ins. Co., 38 N.J.L. 388, 390 (N.J. 1876).

[23] 260 Ind. 336, 295 N.E.2d 799 (1973).

[24] *Id.* at 339, 295 N.E.2d at 801.

[25] Ind. Code § 32-11-1-10 (Burns 1973).

[26] 260 Ind. at 339, 295 N.E.2d at 801.

porter who recorded and transcribed the deposition[27] and not to the court nor by fee bill.[28]

A. Court Survey

Because of the difficulty in determining what costs of litigation are assessed against the losing party in Indiana courts, a questionnaire[29] was sent to each of the ninety circuit courts in Indiana. Thirty-eight counties, through their clerks' offices, responded. A sample questionnaire, with a composite response, is included as an Appendix to this Note. The replies reveal an appalling lack of uniformity among the counties as to items assessed as costs. For example, twenty-five counties reported they included witness fees in taxable costs while thirteen said they did not;[30] and thirteen counties indicated deposition costs were included while twenty-five said they were not.[31] The procedures used by the courts in taxing costs, however, were fairly uniform.[32] A more detailed discussion of the replies will be included as each category of costs is considered.

B. Filing Fees

A wide variety, but by no means all, of the expenses incurred during litigation are taxable as costs against the losing party, and as noted above, the allowance of certain items varies from court to court. The first and most obvious category of taxable costs is the filing fee paid in order to initiate the lawsuit. This fee encompasses docket fee, clerk's service fee, and the cost of service of process, either by sheriff or registered mail. The filing fee which can be collected upon the filing of a lawsuit is prescribed

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[27]See pp. 687-88 *infra* for a discussion of deposition costs.

[28]IND. CODE § 33-1-10-1 (Burns 1975).

[29]Hereinafter cited and referred to in text as "Court Survey." The author would like to express her appreciation to the staff of the Indiana Judicial Center for their assistance in this Survey, as well as to the county clerks and judges who replied to the questionnaire. A sample questionnaire with compiled results is set forth as an appendix to this Note, and all completed questionnaires received from the courts are on file at the offices of the *Indiana Law Review*, 735 West New York Street, Indianapolis, Indiana 46202. The counties whose clerks replied to the questionnaire are: Boone, Carroll, Clay, DeKalb, Elkhart, Fayette, Franklin, Fulton, Gibson, Greene, Jackson, Jasper, Jefferson, Knox, Kosciusko, LaGrange, Lawrence, Marion, Morgan, Newton, Noble, Orange, Owen, Parke, Porter, Posey, Putnam, Randolph, Shelby, Starke, Steuben, Sullivan, Vermillion, Warren, Warrick, Wayne, White, and Whitley.

[30]Court Survey, question 3.

[31]*Id.*, question 5.

[32]*Id.*, questions 6 to 10.

by statute,[33] which breaks it down into categories. The statute provides that only the docket fee portion of the filing fee is taxable as a cost,[34] but the courts almost uniformly award the entire filing fee as a cost against the losing party.[35]

C. *Witness Fees*

The statutory fees paid to witnesses are also taxable as costs.[36] Witnesses subpoenaed or appearing voluntarily at trial are allowed a per diem allowance plus mileage going to and returning from court.[37] At present, for circuit, superior and criminal courts, the per diem is $5 and the mileage allowance is equal to the mileage allowance for state employees, regardless of whether the court is in the witness' home county.[38] If more than three witnesses are subpoenaed to testify to the same fact in a civil case, however, the party calling them must bear the costs of all in excess of

[33] IND. CODE § 33-1-9-1 (Burns 1975).

(a) Upon the institution of any civil action or proceeding . . . there shall be paid by the party or parties so instituting such action or proceeding the sum of nineteen dollars [$19.00], seven dollars [$7.00] of which shall constitute a docket fee payable to the state of Indiana, and which said docket fee now required by law to be taxed by clerks of circuit courts for any action in any circuit, superior, or probate court wherein there is a plaintiff and defendant, except as hereinafter set out; six dollars [$6.00] of which shall constitute a clerk's service fee, which . . . shall belong to and become the property of the general fund of any county where such civil action is filed and the remaining six dollars [$6.00] shall constitute an advance payment on service of process fees . . . .

[34] *Id.* § 33-1-9-1(c). "If the party instituting any such action or proceeding shall recover judgment, such judgment shall also include as costs an amount equal to the docket fee provided for by this section."

[35] All counties but one tax the entire filing fee. Court Survey, question 1. According to a clerk's manual used by many of the clerks, the term docket fee may, as a practical matter, be used to refer to the entire filing fee. Manual of Instructions and Legal Guide for Clerks of the Circuit Courts of Indiana 132 (State Bd. of Accts. 1966).

[36] 1947 OPS. ATT'Y GEN. IND. No. 10, at 37.

[37] IND. CODE § 5-7-9-4 (Burns Supp. 1975) provides in part:

Witness fees in the circuit, superior and criminal courts shall be as follows, to wit:

Every witness attending the circuit, superior, and criminal courts, in his own county, per day, five dollars [$5.00].

Every witness attending the circuit, superior, and criminal courts, from another county, per day, five dollars [$5.00].

For each mile necessarily traveled in going, and returning from court, from his residence, a sum for mileage equal to that sum per mile paid to state officers and employees.

[38] *Id.*

three.[39] This seems a just rule. Three witnesses should be sufficient in almost any situation to testify to the same fact, and the losing party should not be penalized if his opponent belabored a point.

It is initially the responsibility of the party calling the witness to pay his fees: witnesses are entitled to have one day's fee and mileage tendered to them at the time they are served with a subpoena.[40] After the first day, the witness must claim the fee from the court and the party calling him must pay the fee to the court. The party taxed with costs is thus responsible to his adversary rather than to the witness for those fees.[41] The witness himself must claim his fee and mileage allowance during the term of the court he attends.[42] Thirteen of the courts responding to the Court Survey said they did not include witness fees in costs taxed against the losing party.[43] However, the comments[44] indicated the reason is probably that witnesses do not receive their fee from the court, but at least presumably are paid directly by the party for whom they testify. Since the money does not come through the court, it has no record of the payment to the witness and cannot include the amount in taxable costs unless the attorney gives the information to the clerk.

Courts have great discretion in deciding whether to allow costs for witnesses who are not used.[45] If the unsuccessful party's conduct made his opponent believe a witness was needed, the former is taxed with the costs of that witness even if he was not called.[46] Ordinarily, if an action is dismissed before trial, the loser is liable for the fees and mileage of his adversary's witnesses.[47]

Even though it is frequently necessary for a party to pay an expert witness a higher fee to testify for him, a statute provides that experts are entitled to the same per diem and mileage as other witnesses;[48] therefore only the statutory amount would be taxable against the losing party, provided the expert claimed the fee from the court.

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[39] *Id.*

[40] IND. R. TR. P. 45(G).

[41] 1947 OPS. ATT'Y GEN. IND. No. 10, at 37.

[42] IND. CODE § 5-7-9-9 (Burns 1974).

[43] Court Survey, question 3.

[44] *E.g.*, "If claimed," "If the witnesses file a claim with the Clerk of the Court," "When subpoena is turned in," "If filed."

[45] Chandler v. Beall, 132 Ind. 596, 32 N.E. 597 (1892).

[46] Ohio & Miss. Ry. v. Trapp, 4 Ind. App. 69, 30 N.E. 812 (1892).

[47] Alexander v. Harrison, 2 Ind. App. 47, 28 N.E. 119 (1891).

[48] IND. CODE § 34-1-14-12 (Burns 1973).

D. Jury Fees

The courts vary as to whether they include in costs any fees collected in cases where juries are called.[49] When a jury fee is included in costs, it does not include the per diem and mileage fees paid to jurors for serving,[50] but rather nominal amounts charged as clerk's service fees and jury fees.[51] At present these amounts are: a $3 clerk's service fee and a $10 jury fee when a jury is sworn;[52] a $5 clerk's service fee when a jury is called but not used;[53] and a $3 fee payable to the county or city, if in a city court, when a cause is tried by a jury.[54] However, if a party requests a struck jury,[55] he is liable for the jurors' full compensation and mileage and is not entitled to be reimbursed when costs are taxed unless the court has determined that the special jury was needed. [56]

E. Change of Venue

A party requesting a change of venue from the county is liable to pay the costs of the change before the papers and transcript are sent to the new county.[57] If he fails to do so, he may properly be taxed with all costs in the case to the time of his failure to perfect the change of venue.[58] The costs involved are the clerk's costs in preparing the transcript and certifying it.[59] These costs must be paid before a change of venue can be perfected, and if the cause has already been transferred to the new county of venue, it should be returned to the original county if the costs are not paid.[60] If the requesting party does not pay the costs of the change, his adversary may perfect the change if he so wishes by paying the costs himself.[61]

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[49]Court Survey, question 4. Twenty-two courts said they did tax the clerk's jury fee, and fourteen said they did not. Two courts did not reply.

[50]IND. CODE § 33-4-5-8 (Burns 1975).

[51]*Id.* §§ 33-1-11-5, 33-4-5-8.

[52]*Id.* § 33-1-11-5.

[53]*Id.*

[54]*Id.* § 33-4-5-8.

[55]Forty names are drawn from the box containing the names of the persons selected for jury service; the parties or their representatives then strike off names alternately until only sixteen remain. The first twelve of the sixteen who are seated comprise the jury. *Id.* § 34-1-20-1 (Burns 1973).

[56]*Id.* § 34-1-20-3.

[57]*Id.* § 34-1-13-2.

[58]*Id.*

[59]State *ex rel.* O'Neill v. Pyle, 204 Ind. 509, 184 N.E. 776 (1933).

[60]Furry v. O'Connor, 1 Ind. App. 573, 28 N.E. 103 (1891).

[61]Clinton Coal Co. v. Chicago & E.I.R.R., 190 Ind. 465, 130 N.E. 798 (1921).

Since the statute and cases are so clear that the moving party is responsible for paying the costs of the change of venue, no question on the subject was included in the Court Survey. However, the *Manual of Instructions and Legal Guide for Clerks of the Circuit Courts of Indiana,* published by the State Board of Accounts and relied on by many of the clerks,[62] includes the cost of a change of venue in the costs assessed against the losing party.

If an action is commenced in a court of improper venue and there is an objection, that court transfers the cause to a court in which it should have been filed. The person responsible for the improper filing must pay the same costs as are chargeable on a change of venue.[63] That person must also pay the mileage expenses of the objecting party and his attorney in resisting the original venue.[64] Additionally, if the court finds that there was bad faith in commencing the action in an improper court, it may require the person responsible to pay the objecting party's reasonable attorney fees in resisting venue.[65]

F. Depositions

Often the most financially significant item which an unsuccessful litigant must pay his adversary is the cost of depositions. The cost of one deposition can be hundreds of dollars. In the Court Survey, thirteen counties replied they did tax deposition costs, while twenty-five replied they did not.[66] The amount involved in those counties which do tax deposition costs, is the "notary fee" which is entered on the outside of an envelope containing a deposition when it is delivered to the court by the reporting service. The clerk's office enters this amount into the docket book and indicates which party has paid for the deposition. The notary fee is the amount charged by the reporting service for producing an original copy of the deposition for the court; it includes the reporter's transportation and expenses, recording and transcribing of the deposition, and postage to the court if necessary.[67]

According to the replies to the Court Survey, only one county which does tax depositions requires that the deposition actually be used at trial before costs will be taxed to the losing party. All the other courts allowing depositions add no further requirements. Several of the counties which do not tax deposition costs as a

[62]Clerk's Manual, *supra* note 35, at 138.

[63]IND. R. TR. P. 75(B).

[64]*Id.* 75(C).

[65]*Id.*

[66]Court Survey, question 5.

[67]Conversation with Mr. Don Oakes, Powell & Oakes Reporting Service, Indianapolis, Indiana.

general rule indicated that they are occasionally allowed when the court so directs.[68]

Both practices can be supported by authority. If the definition from *State v. Holder*[69] is followed, the taxing of deposition costs should not be allowed because the cost is not paid directly into the court, but to the reporting service. However, Indiana Code section 34-1-33-1 provides:

> When in any suit pending in any court in this state it shall be necessary to procure a transcript of any judgment or proceeding, or exemplification of any record, as evidence in such action, the necessary expense of procuring such transcript or exemplification shall be taxed with the other costs in the cause, and recovered as in other cases.[70]

This language would seem to authorize the taxing of deposition costs. This impression is strengthened by the fact that the taxation of deposition costs in federal courts is held to be authorized under a similar provision: "A judge or clerk of any court of the United States may tax as costs the following: . . . (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case."[71] For a deposition to be taxable in federal courts, it must have been used for trial or reasonably necessary.[72] If that somewhat vague "necessariness" test could be defined by a ruling of the Indiana Supreme Court, it would seem to fit the requirements of the statute and at the same time provide a more equitable distribution of costs. If a deposition is necessary, there is no reason the losing party in the action should not have to pay his opponent's costs in taking it. On the other hand, the prevailing party should not be able to burden his opponent with frivolous charges.

G. Attorney Fees

The most controversial element of costs has been attorney fees. The general rule in Indiana, as in most other jurisdictions, is that attorney fees are not recoverable as a cost by the prevailing party to a lawsuit, whether in law or equity, unless there is a statute authorizing such an award or an enforceable agreement or stipulation about attorney fees.[73] There have been certain ex-

[68]Court Survey, question 5.

[69]260 Ind. 336, 295 N.E.2d 799 (1973).

[70]IND. CODE § 34-1-33-1 (Burns 1973).

[71]28 U.S.C. § 1920 (1970).

[72]See the discussion of costs in federal courts at pp. 695-97 *infra*.

[73]Saint Joseph's College v. Morrison, Inc., 302 N.E.2d 865 (Ind. Ct. App. 1973).

ceptional situations in which the courts have used their inherent equity power to award attorney fees absent statute or agreement. The exceptions were discussed by the Indiana Court of Appeals in *Saint Joseph's College v. Morrison, Inc.*[74] They are: (1) Cases in which the opposing party has acted in bad faith; (2) common fund situations, as in class actions; and (3) private attorney general situations. In the *Saint Joseph* case, the court refused to allow an award of attorney fees to stand because the appellant's behavior had not been vexatious or oppressive, and the other exceptions did not apply.

One of the most recent Indiana cases on the subject of attorney fees is *Palace Pharmacy, Inc. v. Gardner & Guidone, Inc.*,[75] an action to recover damages and costs on an injunction bond after the injunction had been dissolved. The court held that in such cases attorney fees are a proper element of recovery because the purpose of the bond is to compensate the defendant for any expenses incurred in defending against the injunction.

Until recently the case of *La Raza Unida v. Volpe*[76] had been widely cited in those cases where a private citizen was acting to effectuate strong congressional policy, and attorney fees were awarded under the private attorney general exception to the general rule that parties pay their own attorney fees. However, in 1975, the United States Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*[77] expressly disapproved the award of attorney fees by federal courts in private attorney general situations. The Court held that to make such awards would be to "make major inroads on a policy matter that Congress has reserved for itself."[78] The majority reasoned that since Congress has enacted legislation allowing attorney fees in specific private attorney general situations, the absence of authorization in other situations implies that attorney fees are not allowable in the latter situations. Additionally, the Court pointed out that there is a statute[79] which allows small amounts of attorney fees, or "attor-

[74]302 N.E.2d 865, 870 (Ind. Ct. App. 1973), *citing* La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972).

[75]329 N.E.2d 642 (Ind. Ct. App. 1975).

[76]57 F.R.D. 94 (N.D. Cal. 1972).

[77]421 U.S. 240 (1975).

[78]*Id.* at 269.

[79]28 U.S.C. § 1923 (1970). This statute reads in part:

> (a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:
>
> $20 on trial or final hearing . . . in civil, criminal, or admiralty cases, except that in cases of admiralty and maritime jurisdiction where the libellant recovers less than $50 the proctor's docket fee shall be $10;
>
> . . . .

ney's docket fees,"[80] to be taxed as costs and that this statute has been consistently enforced by the courts as the only general authorization for the recovery of attorney fees as costs.[81]

The Supreme Court approved the other two judge-made exceptions to the "American Rule"[82] that attorney fees are not recoverable. In the case of bad faith, attorney fees are an appropriate penalty; and in common fund situations, the "party preserving or recovering a fund for the benefit of others in addition to himself . . . [may] recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit."[83] Thus, as a district court noted recently in *Samuel v. University of Pittsburgh*,[84] the decision in *Alyeska* leaves only four situations in which the American rule of payment by each party of his own attorney fees may be deviated from: statutory authority, enforceable agreement,[85] bad faith, and common fund.

The Court in *Alyeska* did note, however, that "a very different situation is presented when a federal court sits in a diversity case."[86] If a state has a substantial policy of granting or denying attorney fees, forum shopping could result from allowing litigants to thwart the policy by proceeding in federal court. If a state has a statute granting attorney fees in certain situations, the federal court would be bound to apply it. Although "the same would clearly hold for a judicially created rule, . . . the question of the proper rule to govern in awarding attorneys' fees in federal diversity cases in the absence of state statutory authorization loses much of its practical significance in light of the fact that most States follow the restrictive American rule."[87] Although the Indiana Court of Appeals in *Saint Joseph's College* cited *La*

$5 on discontinuance of a civil action;

$5 on motion for judgment and other proceedings on recognizances;

$2.50 for each deposition admitted in evidence.

The *Alyeska* Court commented that the intent of this statute was that recovery of attorney fees as costs be limited to the sums specified in the statute.

[80]See also the discussion of costs in federal courts pp. 695-97 *infra*.

[81]421 U.S. at 255-57.

[82]The "English Rule," on the other hand, is that counsel fees may be and regularly are allowed to be awarded as a cost. *Id.* at 247.

[83]*Id.* at 257.

[84]395 F. Supp. 1275 (W.D. Pa. 1975).

[85]A recent Indiana case, Honey Creek Corp. v. WNC Development Co., 331 N.E.2d 452 (Ind. Ct. App. 1975), confirmed that Indiana will uphold a contractual agreement to pay attorney fees so long as the contract is not contrary to law or public policy. *Id.* at 459.

[86]421 U.S. at 259 n.31.

[87]*Id.*

Raza Unida[88] with approval, no case has been found where attorney fees were allowed as a cost in a private attorney general situation in Indiana.

A recent Seventh Circuit decision, *Satoskar v. Indiana Real Estate Commission*,[89] followed the Supreme Court's holding in *Alyeska* and refused to allow the award of attorney fees to a plaintiff who had succeeded in having an Indiana statute precluding aliens from applying for real estate licenses declared unconstitutional but who had not succeeded on class and damages aspects of the case. The plaintiff was not entitled to attorney fees under a private attorney general rationale because of the *Alyeska* decision, and was not entitled to attorney fees under the common fund exception because the class of persons benefited was too indefinite and the benefits to resident aliens of Indiana was "merely theoretical and not reducible to monetary figures."[90] So the courts are not going to allow attorney fees when there is merely common benefit, but only when there is actually a common fund recovered.

IV. Procedures Involved in Taxing Costs in Trial Courts

The actual taxation of costs is a ministerial duty of the clerk.[91] There is some dispute in the authorities about whether the judge must enter a judgment for costs, or whether the clerk can automatically assess the costs against the losing party without the order of the judge. On the one hand, case law developed under Indiana Code section 34-1-32-1, which provides for the prevailing party to recover costs, has consistently held that there must be a judgment for costs[92] and that if there is no judgment for costs, each party must bear his own costs.[93] On the other hand, when the Civil Code Study Commission proposed Trial Rule 54(D), it specifically stated that its intention was that the rule make it unnecessary for a judgment for costs to be entered before the clerk could tax costs.[94] At the same time, the commission indicated that prevailing law would continue to control the matter

[88]302 N.E.2d at 870, *citing* La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972).

[89]517 F.2d 696 (7th Cir.), *cert. denied*, 96 S. Ct. 276 (1975).

[90]*Id.* at 698.

[91]Ind. R. Tr. P. 54(D) ("costs may be computed and taxed by the clerk on one [1] day's notice"); 3 W. Harvey, Indiana Practice 496 (1970).

[92]McNelis v. Wheeler, 225 Ind. 148, 73 N.E.2d 339 (1947).

[93]*Id.*

[94]3 W. Harvey, Indiana Practice 491-92 (1970) (Civil Code Study Commission Comments).

of costs.[95] From comments made in some of the responses to the Court Survey, it appears that many judges do enter judgments for costs and that the clerks depend on this to know whether to tax costs against the losing party.[96]

Even in cases where judges do believe it necessary to enter a judgment for costs, it is not necessary for taxable costs to be enumerated in the judgment,[97] nor is it proper for the court to make findings with regard to costs.[98] It is the clerk's duty to ascertain the amount of taxable costs and see that they are charged against the losing party.

Costs are normally entered into the docket book as they accrue in Indiana trial courts; the clerk totals these items and determines which amounts the prevailing party has paid or is liable to pay. The loser, then, in most courts,[99] pays this amount into the court; the clerk apportions the amounts payable to the court and officers of the court to the proper fund, and the remaining amount may be claimed by the prevailing party.[100] The statute which allows clerks to receive money in payment of judgments[101] has been construed to authorize them to collect money for costs.[102]

A further duty of the clerk is to secure a cost bond from any plaintiff who is a nonresident of the state.[103] If he fails to do so, the opposing party may move to require such a cost bond.[104] A clerk can even become liable on his own bond for unpaid costs to the court and officers of the court if he fails to require a bond from a nonresident of the state.[105]

The remedy for improper taxation of costs is a motion to retax.[106] Trial Rule 54 provides that the action of the clerk may be reviewed by the court on motion within five days after the taxation of costs. A motion to retax must specify the errors in

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[95]*Id.*

[96]*E.g.*, "If so ordered," "If so ordered by judge," "Judge's order."

[97]Palmer v. Glover, 73 Ind. 529 (1881).

[98]Newlin v. Newlin, 114 Ind. App. 574, 52 N.E.2d 503 (1944).

[99]Court Survey, question 10. Only four courts responding said the losing party did not pay the costs into the court to be withdrawn by the prevailing party.

[100]*Id.*

[101]IND. CODE § 33-15-14-1 (Burns 1975).

[102]Hammann v. Mink, 99 Ind. 279 (1884).

[103]IND. CODE § 34-1-32-7 (Burns 1973).

[104]*See* Smith v. Keyes, 103 Ind. App. 487, 9 N.E.2d 119 (1937).

[105]IND. CODE § 5-7-1-15 (Burns 1974).

[106]Washington Hotel Realty Co. v. Bedford Stone & Constr. Co., 196 Ind. 396, 148 N.E. 405 (1925).

taxation and notice must be given to the opposing party.[107] If a party wishes to appeal the denial of a motion to retax, he should assign such denial in a motion to correct errors;[108] the denial of the motion to retax would then be appealable along with the judgment in the action so long as there was a final disposition of the cause.[109] If the assignment of error is that costs were awarded to an improper party, it has been held to be properly raised in a motion to modify the judgment.[110] A judgment for costs gives to its owner the same rights as any other money judgment.[111]

V. Costs on Appeal

The costs taxable to the losing party on appeal are fewer and therefore easier to ascertain than those in the trial courts. Appellate Rule 15(G) provides that the "fee paid for procuring the transcript . . . and the costs of serving and notice of appeal are a part of the costs of the court on appeal." It is additionally provided by statute that the cost of the transcript of any judgment or proceeding necessary for appeal is taxable.[112] It must be noted, however, that only that portion of the transcript from the trial court which is necessary to support the assignment of error is taxable. In *Adams Express Co. v. Welborn,*[113] the appellant assigned as error a question of law and was not allowed to be reimbursed by his opponent for the transcript of evidence since it was not necessary for the appeal. It follows that if the transcript of evidence is necessary, the fee paid to the court reporter for it is taxable as well as the fee paid to the clerk of the trial court for the court transcript.[114] Appeal bond premiums are taxable[115]

[107]Crews v. Ross, 44 Ind. 481 (1873); *see* Reimer v. Sheets, 128 Ind. App. 400, 149 N.E.2d 554 (1958); Marion County Ind. Cir. & Super. Ct. R. Prac. & P. 28.

[108]Ind. R. Tr. P. 59.

[109]Kelley v. Augsperger, 171 Ind. 155, 85 N.E. 1004 (1908).

[110]Merrill v. Shirk, 128 Ind. 503, 28 N.E. 95 (1891).

[111]Keifer v. Summers, 137 Ind. 106, 35 N.E. 1103 (1894). A judgment for costs can be collected in the same manner as the principal of the judgment, including execution. Church v. Hay, 93 Ind. 323 (1884). The same rules as to exemptions under a writ of execution apply to costs when collected along with a judgment. *Id*; Donaldson v. Banta, 5 Ind. App. 71, 29 N.E. 362 (1891). Thus, costs in tort actions are subject to no exemptions and those in contract actions are subject only to the exemptions in the statute. *See* Ind. Code § 34-2-28-1 (Burns 1973). But a judgment for costs standing alone is not subject to exemptions. Ross v. Banta, 140 Ind. 120, 34 N.E. 865 (1895).

[112]Ind. Code § 34-1-33-1 (Burns 1973). For the text of section 34-1-33-1, see p. 688 *supra.*

[113]59 Ind. App. 330, 336, 109 N.E. 420 (1915) (on motion to retax costs).

[114]Howard v. Robinette, 123 Ind. App. 206, 109 N.E.2d 432 (1952).

[115]Houston v. First Fed. Sav. & Loan Ass'n, 144 Ind. App. 604, 248 N.E.2d 169 (1969).

but only if they have actually been paid;[116] and a special docket fee of $10 is taxable to the losing party on appeal.[117] But each party must bear the cost of printing his own brief.[118]

The clerk of the Indiana Supreme Court can automatically include those costs which are paid directly to the court, such as filing fees, but the prevailing party has the responsibility to inform and prove to the clerk the amount of fees paid to the clerk or court reporter of the trial court for transcripts since those persons are not required to inform the appellate courts of these costs.[119] The usual procedure is for the clerk to send the losing party a statement of taxable costs to be paid by him; therefore, the prevailing party must inform the clerk of such items as transcripts within a reasonable time so that the party paying the costs can be sure his obligation has been satisfied.[120] A reasonable time has been defined as within the time for filing a petition for rehearing,[121] but petitions for taxation of costs have been allowed after that time, and the determination of reasonableness seems to depend on the facts and circumstances of each case.[122] A motion to retax costs in the appellate courts must also be filed within a reasonable time, for the same reasons.[123]

If the judgment appealed from is affirmed in whole, the appellee recovers costs; if it is reversed in whole, the appellant recovers his costs in both the appellate and trial courts; and if the judgment is affirmed in part and reversed in part or otherwise disposed of, the court can apportion costs as it deems equitable.[124]

When an Indiana appellate court finds that an appeal has been taken frivolously, it has the power under Appellate Rule 15(F) to award an assessment against the appellant of ten per-

[116]IND. CODE § 23-1-16-7 (Burns 1972). *See* General Grain, Inc. v. Goodrich, 142 Ind. App. 142, 233 N.E.2d 187 (1968). In this case, a portion of the appeal bond premium had not yet been paid, and the appellee was not allowed to recover the unpaid amount from the appellant.

[117]IND. CODE § 33-3-2-16 (Burns 1975).

[118]IND. R. APP. P. 15(G)(2).

[119]Howard v. Robinette, 123 Ind. App. 206, 109 N.E.2d 432 (1952). An enumeration of costs expended is usually included in a motion to tax costs. 1 A. BOBBITT, INDIANA APPELLATE PRACTICE AND PROCEDURE 471 (1972).

[120]Howard v. Robinette, 123 Ind. App. 206, 109 N.E.2d 432 (1952).

[121]*Id.*

[122]*See* Houston v. First Fed. Sav. & Loan Ass'n, 144 Ind. App. 604, 248 N.E.2d 169 (1969); General Grain, Inc. v. Goodrich, 142 Ind. App. 142, 233 N.E.2d 187 (1968).

[123]Howard v. Robinette, 123 Ind. App. 206, 109 N.E.2d 432 (1952).

[124]IND. R. APP. P. 15(G)(1). In Snider v. Mt. Vernon Hancock School Bldg. Corp., 250 Ind. 10, 234 N.E.2d 632 (1968), the issues being litigated had become moot by the time the parties appeared before the court for oral argument; however neither party had informed the court. The court ordered costs to be apportioned equally.

cent of a money judgment or a discretionary amount where there are no money damages. Although technically an item of damages, this award is generally considered to be an additional element of costs and so will be discussed here. The test for such an award is a strict one, as articulated by the Indiana Supreme Court in *Annee v. State:*[125] the damages are discretionary and "should not be issued without a strong showing of bad faith."[126] Some judges feel the standard should be relaxed somewhat. In *King v. Pollard,*[127] Judge Buchanan, writing for the majority, felt damages should be assessed because the appellant's attorneys had misstated the record.[128] But since there was an allegation in the assignment of error that the evidence at trial had been insufficient to sustain the judgment, he felt the *Annee* test had not been satisfied and reluctantly declined to assess damages. In *Krick v. Farmers & Merchants Bank,*[129] the appellee's attorney fees were included in the Appellate Rule 15(F) damages, demonstrating the courts' wide discretion in awarding these damages.

It is clear from the foregoing discussion that the rules about costs allowable in the appellate courts are more clear-cut and definote than those in the trial courts. If there were only a rule of procedure or a statute pertaining to costs in the trial courts which was equally clear, the lack of uniformity among the trial courts could perhaps be ended.

VI. Costs in Federal Courts

The taxation of costs in federal courts is a more orderly process than in Indiana courts. The Federal Rules of Civil Procedure are, of course, the model for the Indiana Rules of Procedure, and thus many of the same rules apply in both courts. Federal rule 54(d) provides that costs are usually awarded as of course to the prevailing party, and that the clerk shall tax costs and the court review them. Thus far, the federal and Indiana practices are the same. However, Indiana statutes and procedures for taxing costs are less similar.

In order to initiate the clerk's action in taxing costs in federal courts, the prevailing party must file a bill of costs[130] enumerating the allowable costs which he has expended along with

[125]256 Ind. 691, 274 N.E.2d 260, *denying petitions for rehearing to* 256 Ind. 686, 271 N.E.2d 711 (1971).

[126]*Id.* at 692, 274 N.E.2d at 261. The *Annee* test was followed in Hobby Shops, Inc. v. Drudy, 317 N.E.2d 473 (Ind. Ct. App. 1974).

[127]311 N.E.2d 454 (Ind. Ct. App. 1974).

[128]*Id.* at 457.

[129]151 Ind. App. 7, 279 N.E.2d 254 (1972).

[130]28 U.S.C. § 1920 (1970).

an affidavit[131] stating that the items were necessarily incurred in the case and any services which were paid for were actually and necessarily performed. The clerk supplies the party with any data which have been entered in the docket book. The opposing party has the opportunity to object to the taxation of any of the items claimed.[132] Costs which are due to the prevailing party are paid directly to him,[133] not into the court as in most Indiana counties.

A federal statute[134] enumerates the categories of taxable costs. Most of them are the same as the items allowable in the majority of Indiana counties, such as fees of the clerk and marshall, witness fees, and transcript fees. Deposition fees are taxed as costs in federal courts to the extent they were used at trial or were reasonably necessary for use at trial. Those which were taken exploratorily or for preparation are not normally taxable.[135] Although the standard seems vague, the federal courts have interpreted it so often that it is a more authoritative standard than it seems. In *Electronic Specialty Co. v. International Controls Corp.*,[136] the test was stated as follows:

> [A] deposition which is not used at the trial is still taxable in favor of the prevailing party if it appeared to be reasonably necessary to the parties in the light of a particular situation existing *at the time it was taken.* The fact that the deposition is not received in evidence at the trial does not necessarily prevent the taxation of its cost. However, costs incurred for depositions which are merely fishing expeditions and only for the convenience of counsel in marshaling his case, as distinguished from a necessity for use in the solution of issues of the case, are not allowable.[137]

Another version of the test was given in *Federal Savings & Loan Insurance Corp. v. Szarabajka:*[138]

> A deposition taken within the proper bounds of discovery, even if not used at trial, will normally be deemed to be "necessarily obtained for use in the case," and its

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[131] *Id.* § 1924.

[132] Peck, *Taxation of Costs in United States District Courts,* 37 F.R.D. 481, 484 (1965).

[133] *Id.* at 485.

[134] 28 U.S.C. § 1920 (1970).

[135] Peck, *Taxation of Costs in United States District Courts,* 37 F.R.D. 481, 487 (1965). *See also* cases cited note 139 *infra.*

[136] 47 F.R.D. 158 (S.D.N.Y. 1969).

[137] *Id.* at 162 (emphasis the court's) (citations omitted).

[138] 330 F. Supp. 1202 (N.D. Ill. 1971).

> cost will be taxed unless the opposing party interposes a specific objection that the deposition was improperly taken or unduly prolonged.[139]

Perhaps the test could be stated in different words, but the federal courts seem to have little difficulty in deciding whether a deposition was "reasonably necessary" or not.

Two items which are allowable in federal courts, but not in Indiana courts, are fees for exemplifications and copies, including exhibits, maps or drawings necessary for the action, and attorney's docket fees described in 28 U.S.C. § 1923.[140] Section 1923 allows small amounts to be taxed as attorney's and proctor's docket fees whenever a hearing, dismissal or motion occurs, and a small charge for each deposition admitted into evidence.[141] This section was referred to in the *Alyeska* case as being the only general statutory authorization for attorney fees being taxed as costs.[142]

The Seventh Circuit has recently interpreted federal rule 54(d) to require no judgment for costs to be entered by the court before costs can be taxed by the clerk. In *Popeil Brothers v. Schick Electric, Inc.*,[143] the court held that the good faith of the plaintiff was not enough to overcome the presumption created by rule 54 that the prevailing party should recover costs. "The language of the rule reasonably bears the intendment that the prevailing party is prima facie entitled to costs and it is incumbent on the losing party to overcome the presumption."[144] The analogy to Indiana's Trial Rule 54 and the comments of the Civil Code Study Commission is clear: perhaps this same presumption attaches to Indiana Rule of Trial Procedure 54(D).

VII. Conclusion

From the foregoing discussion, it is evident that a definitive statement is needed of what items are allowable as costs and to what extent in Indiana trial courts. The subject is clarified for appellate courts by the Rules of Appellate Procedure and case

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[139] *Id.* at 1210. *See, e.g.*, Advance Business Systems & Supply Co. v. SCM Corp., 287 F. Supp. 143 (D. Md. 1968); Nationwide Auto Appraiser Serv., Inc. v. Association of Cas. & Sur. Cos., 41 F.R.D. 76 (W.D. Okla. 1966).

[140] 28 U.S.C. § 1920 (1970). See note 79 *supra* for the pertinent portions of 28 U.S.C. § 1923.

[141] See note 79 *supra*.

[142] 421 U.S. at 255-57. See the discussion at pp. 689-90 *supra*.

[143] 516 F.2d 772 (7th Cir. 1975).

[144] *Id.* at 775. The court quoted at length from the case of Chicago Sugar Co. v. American Sugar Ref. Co., 176 F.2d 1 (7th Cir. 1949). The gist of the quoted passage was that a showing of extreme bad faith on the part of the prevailing party would be necessary to overcome the presumption.

law. The problem with the subject for trial courts apparently is that the issue of trial court costs does not often reach the appellate level, and there is therefore no opportunity for those courts to rule on questionable areas. Costs is not a subject covered in law school procedure courses, so new attorneys must learn from experience or simply accept the clerk's actions without knowing in advance what items are allowable.

One solution to the problem would be for the Indiana Supreme Court and the Civil Code Advisory Commission to promulgate an additional rule enumerating what expenses of litigation Indiana trial courts are authorized to tax as costs. Since the Indiana Rules of Trial Procedure are based on the Federal Rules of Civil Procedure and therefore similar provisions as to costs are in both sets of rules, another logical solution would be for Indiana to follow the federal practice as to costs to the extent this would be practical. In the absence of a rule promulgated by the Indiana Supreme Court, the Indiana General Assembly could enact legislation similar to 28 U.S.C. §§ 1920 and 1924, giving a list of categories of items taxable as costs in Indiana and the procedures to be followed in claiming them. The requirement of a bill of costs itemized by the party recovering costs and certified by him to the clerk of the court is a sound one in that it makes clear exactly what items are being taxed, enables the party to recover costs expended by him which have not found their way into the docket book, and gives the party paying the costs the opportunity to object to specific items he feels are improper. The federal practice of allowing only depositions which were reasonably necessary for use in the case is a fair one also, and is not unworkably vague. The federal attorney's docket fee statute,[145] however, is antiquated; the amounts given to the attorneys are nominal and bear no reasonable relationship to the rest of the litigation. That sort of statute would serve no useful purpose if enacted in Indiana. If the legislature or the supreme court believes that the majority of courts in Indiana are correct in not taxing deposition costs,[146] or believes the judge should make an independent determination in each case, there is still a need for a rule or statute so stating.

At the very least, each court should publish local rules pertaining to costs or supply a form listing allowable items of costs

[145] 28 U.S.C. § 1923 (1970).

[146] *See* Court Survey, question 5. Twenty-five counties responding said they did not tax deposition costs while only thirteen said they did. The author feels the sample obtained is probably representative of all circuit courts because the replies received were distributed among all sizes and locations of counties.

to each litigant in the court, setting out the procedures for claiming and reporting costs. Then an attorney could let his client know what sort of expenses he might incur if he were unsuccessful in the action. The publication of such rules would also serve to emphasize the lack of guidance given the courts by current law.

One additional suggestion with respect to costs in Indiana is that the test for awarding damages for frivolous appeals be softened, in accordance with the expressed opinion of at least one appellate court judge.[147] It seems ludicrous that an appellant can escape being taxed with this cost simply by alleging that the judgment was contrary to the evidence in the case, even if the record shows the evidence was clearly sufficient. If the standard were relaxed and the damages for frivolous appeals were awarded more frequently, perhaps prospective appellants would be more judicious in deciding to appeal a case, and perhaps the caseload in the appellate courts would be eased. In addition, appellees put to unnecessary expense and aggravation in defending questionable appeals would be at least partially compensated for their trouble and for their attorney fees, which otherwise would not be reimbursed.

It is encouraging to note that the new County Court Law,[148] which became effective on January 1, 1976, contains a clear costs section[149] for small claims cases and provides that all parties re-

[147] *See* note 127 *supra* and accompanying text.

[148] IND. CODE §§ 33-10.5-1-1 to -8-6 (Burns Supp. 1975).

[149] *Id.* § 33-10.5-8-5. This section reads in pertinent part:

> (a) The costs in cases on the small claims docket of the court, including those involving actions by a city or town for ordinance violations, shall consist of:
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> (1) A county docket fee in the amount of ten dollars [$10.00] to include service of process by registered mail;
>
> (2) The costs of publication of notices, if any, or sheriff's costs for the service of any writ, process or other papers issued by the court, or the proper officer thereof, as is required by law to be taxed and charged for like services in circuit courts; and
>
> (3) Witness fees, if any, in an amount as is provided for by law in circuit court.
>
> The county docket fee provided herein shall be in lieu of any docket fee or clerk's service fee required by law to be taxed by circuit courts in civil actions and shall be paid upon the institutions [institution] of each civil case.
>
> . . . .
>
> (c) Costs in other cases including those on the plenary docket and those involving actions by a city or town for ordinance violations shall be taxed and adjudged in the same manner and for the same amount as costs are taxed and adjudged in the circuit court. In an action in the county court, if a party shall recover judgment, he shall also recover costs regardless of the amount involved. (Bracket in original).

covering judgment in the county courts shall recover costs with no limitations as to the amount involved.[150]

The subject of costs in Indiana is confusing at best. Although the system no doubt functions fairly and equitably most of the time within individual courts, it is unthinkable that there should be ninety different methods of computing costs, varying with the county one happens to be in. The possibility of abuse of the system is thus clearly present, and since the inequities and lack of uniformity could be cured by statutory enactment or rule of procedure, it is inexcusable to continue the system in such a haphazard way.

LYNN BRUNDAGE

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[150] *Id.* § 33-10.5-8-5(c).

Appendix

QUESTIONNAIRE

Name of court: _____

Please reply to the following questions based on the practice in your county in taxing costs against the losing party in litigation:

1. Is the entire filing fee included in taxable costs?
   Yes *37* No *1*

2. Is only the docket fee portion of the filing fee included?
   Yes *0* No *38* Comments:

3. Are witness fees (per diem and mileage) included?
   Yes *25* No *13* Comments:

4. Are clerk's jury fees included?
   Yes *22* No *14* Comments: [No reply: *2*]

5. Are depositions included?
   Yes *13* No *25*

   Is it necessary for the deposition to have been used at trial?
   Yes *1* No *37* Comments:

   Are there any other requirements as to depositions?
   Yes *0* No *38* Comments:

6. Does the taxation procedure in your court involve the filing by the prevailing party of a bill of costs?
   Yes *5* No *31* [No reply: *2*]

7. Does the clerk ascertain the amount of costs solely from the docket book?
   Yes *34* No *2* Comments: [No reply: *2*]

8. Do you have any local court rules regarding costs?
   Yes *2* No *36* Specify:

9. Is a statement sent to the losing party enumerating costs?
   Yes *12* No *26*

10. Is the money paid into the court and withdrawn by the prevailing party?
    Yes *32* No *4* [No reply: *2*]

Recent Development

Environmental Law — WATER POLLUTION — A corporation operating outside the forum state is liable to the state in which the trial court sits under the forum state's standards for the pollution of interstate waters.—*State ex rel. Scott v. Inland Steel Co.*, 72-CH-259, 67-CH-5682 (Cir. Ct. Cook County, Ill., Sept. 8, 1975).

In *State ex rel. Scott v. Inland Steel Co.*,[1] the Cook County Circuit Court found Inland Steel Company, a Chicago-based company operating in Indiana, guilty of interstate water pollution and fined the company $1,905,000, plus $1,000 a day, until the company files an abatement plan acceptable to the State of Illinois and the Metropolitan Sanitary District of Greater Chicago (MSD).[2] Although in deciding *Inland Steel*, the Illinois trial court addressed the issue of subject matter jurisdiction, it did not turn its attention to the more specific issues of whether the state court was itself the proper arbiter or whether the damages should have been mitigated due to the polluter's compliance with other pertinent environmental standards.

The action was originally filed by the MSD in 1967 and was consolidated with one brought in 1972 by the Attorney General of Illinois. The plaintiffs' complaint was in two counts, citing 235

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[1]72-CH-259, 67-CH-5682 (Cir. Ct. Cook County, Ill., Sept. 8, 1975) (Memorandum Ruling). See CCH POLLUTION CONTROL GUIDE, NEWSLETTER 476 (Sept. 15, 1975).

[2]72-CH-259, 67-CH-5682 (Cir. Ct. Cook County, Ill., Sept. 8, 1975) at 18. Illinois Attorney General William J. Scott was quoted as calling the decision a "crucial legal precedent" and saying that the ruling "will determine whether we can stop destruction of the south end of the lake." Hammond Times, Sept. 11, 1975, at 43, col. 1. The Chairman of the Board of Inland Steel, Frederick G. Jaicks, reacted to the decision in the following statement:

> It calls for technology which doesn't exist. We remain convinced the state did not prove its contention that Inland's waste waters have adversely affected the drinking water of the City of Chicago or any other use of Lake Michigan. In addition, we believe there is no logical basis for the exorbitant punitive penalty assessed against us.

98 CCH POLLUTION CONTROL GUIDE, NEWSLETTER 476 (Sept. 15, 1975). Referring to another Indiana pollution case Attorney General Scott had entered, Indiana Attorney General Theodore L. Sendak said, "[O]fficials have their hands full in their own states without getting involved in the problems of other states." Hammond Times, Sept. 11, 1975, at 43, col. 1.

pollution violations.[3] First, plaintiffs alleged that Inland's discharges move into Illinois waters of Lake Michigan. Secondly, the plaintiffs asserted that the discharges endanger the drinking water drawn by the City of Chicago from its South Water Filtration Plant. The plant is located 8½ miles from Inland's Indiana Harbor Works. Inland denied that the discharges endanger the health of Chicago area citizens by contaminating their drinking water or in any other way. Further, the company contended that there was no good evidence that the discharges reach Illinois waters or that the lake is harmed by the types of materials discharged. Plaintiffs claimed that four types of the effluents actually harm Illinois waters: oil, ammonia, suspended solids, and phenol. Those wastes amount to a daily average of 924 million gallons.[4] Inland specifically contested the charge in each category.[5]

Despite the lapse of time since the MSD suit was filed in 1967, an out-of-court settlement was not reached. The MSD and the attorney general demanded that Inland recycle all of the billion gallons used each day, whether for processing or cooling, through an anti-pollution system. Inland resisted the provision for a comparatively lower discharge limit than that already accepted by Illinois in its settlement with Youngstown Sheet and Tube Company.[6]

After evaluating the voluminous technical evidence,[7] trial Judge Cohen ruled that Inland violated the Illinois Environmental Protection Act.[8] He fined the company $10,000 for the initial violation and $1,000 a day from July 1, 1970, the date the Act took effect.[9] In addition, Judge Cohen set daily maximum discharge limits for solids and oil. Daily discharges of phenol, ammonia, and cyanide were set at 1½ times the amount permitted

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[3]72-CH-259, 67-CH-5682 (Cir. Ct. Cook County, Ill., Sept. 8, 1975) at 18.

[4]Chicago Sun-Times, Sept. 10, 1975, at 73, col. 1.

[5]Inland Steel Company, Chicago, Ill., Press Release, Sept. 8, 1975.

[6]72-CH-259, 67-CH-5682 (Cir. Ct. Cook County, Ill., Sept. 8, 1975) at 17. The settlement between the State of Illinois and Youngstown Sheet and Tube Company (located next to the Inland Steel plant) was the first case in which one state has been able to get a court-enforced commitment by a major industry in another state to stop polluting. 45 CCH POLLUTION CONTROL GUIDE, NEWSLETTER 654-55 (Sept. 9, 1974).

[7]The court found liability when it was presented with factual evidence in the form of satellite photographs, infrared imagery, aerial surveys, and voluminous testimony. The state's objective was to show the trail of a plume from the canal reaching into Illinois waters visually, thermically, and chemically. Chicago Tribune, Sept. 10, 1975, at 2, col. 6.

[8]ILL. ANN. STAT. ch. 111½, §§ 1001-1051. (Smith-Hurd Cum. Supp. 1975-76).

[9]72-CH-259, 67-CH-5682 (Cir. Ct. Cook County, Ill., Sept. 8, 1975) at 18.

under the Youngstown Sheet and Tube Agreement.[10] In spite of a significant reduction in effluent discharges made by Inland between 1967 and 1974, the court also assessed damages of $1,905,000 up to September 8, 1975.[11] Although Inland's representatives stated that the treatment effort had cost $36 million, Judge Cohen said that he ordered a large fine and $1,000 per day thereafter to the date such violations cease because "a lesser fine would have a slight impact and provide little incentive to correct the abuses or to deter the incessant, relentless continuation of such abuses."[12]

At the threshold of its opinion, the trial court expressed the importance of the jurisdictional issue.[13] As the trial court stated, "the crucial issue in this case is whether Illinois law may be enforced to abate the pollution of interstate waters."[14] The court's response was to hold that it did indeed have jurisdiction and that the Federal Water Pollution Control Act[15] had not preempted the field.

In support of its holding, the court cited the United States Supreme Court decision in *Illinois v. Milwaukee*,[16] which stated that the pollution of interstate waters could constitute a nuisance under federal common law.[17] Therefore, the trial court's exercise of jurisdiction was not found inconsistent with federal enforcement powers under the Water Pollution Control Act,[18] because that statute does not necessarily form the outer limits of pollution laws. Indeed, the Supreme Court in *Milwaukee* stated that "a State with higher water quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor."[19]

The trial court's holding also conforms to the decision in *United States v. Ira S. Bushey & Sons*.[20] In that case the federal

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[10] *Id.* at 20.

[11] *Id.* at 18.

[12] *Id.* at 19.

[13] *Id.* at 2.

[14] *Id.*

[15] 33 U.S.C. §§ 1154-55 (1970).

[16] 406 U.S. 91 (1972). Illinois' bill to invoke the original jurisdiction of the Supreme Court was denied without prejudice by the Court which held that the appropriate federal district court had jurisdiction under 28 U.S.C. § 1331(a) (1970) to give relief against the nuisance of interstate water pollution and was therefore the proper forum for litigation on the issues therein involved.

[17] *Id.* at 98-101.

[18] 33 U.S.C. §§ 1154-55 (1970). This Act tightens control over discharges into navigable waters so as not to lower other applicable water standards.

[19] 406 U.S. at 107.

[20] 346 F. Supp. 145 (D. Vt. 1972). This case summarizes the use of the federal common law of nuisance in assisting in anti-pollution enforcement. *See*

district court relied on " 'poor old nuisance' as a legal theory useful in the resolution of pollution conflicts involving interstate or navigable waters."[21] Relying on *Bushey*, the trial court thus held that the Federal Water Pollution Control Act did not preempt Illinois' right to seek an abatement of the defendant's pollution.[22]

The court found further support for its exercise of jurisdiction by concluding that Illinois' interests in bringing the action were as compelling as those of the Federal Government. The authority for the court's position is the District Court for the Northern District of Illinois' decision in *United States ex rel. Scott v. United States Steel Corp.* [23] The court in *United States Steel* held that it had jurisdiction under 28 U.S.C. § 1331(a) to hear the Federal Government's and Illinois' suit under the federal common law of nuisance to enjoin the steel company's waste water discharge into Lake Michigan.[24] The Federal Government's proprietary interest in protecting navigable waters conferred standing upon it to sue. Illinois was found to have a protectable interest as well, in that Illinois wished to safeguard the purity and recreational value of Lake Michigan; therefore it had standing to sue under the federal common law of nuisance to enjoin the steel company's waste water discharge.[25]

An additional bulwark for the trial court's holding was *Texas v. Pankey*.[26] In *Pankey* the Tenth Circuit Court of Appeals said:

> As the field of federal common law has been given necessary expansion into matters of federal concern and relationship (where no applicable federal statute exists, as there does not here), the ecological rights of a State in the improper impairment of them from sources outside the State's own territory, now would and should, we think, be held to be a matter having basis and standard in federal common law and so directly constituting a question arising under the laws of the United States.[27]

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also Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 331 (1967); Note, *Federal Common Law and Interstate Pollution*, 85 HARV. L. REV. 1439, 1451-56 (1972).

[21] 346 F. Supp. at 149.

[22] 72-CH-259, 67-CH-5682 (Cir. Ct. Cook County, Ill., Sept. 8, 1975) at 2. *See* Illinois v. Milwaukee, 406 U.S. 91 (1972). See Note, *Federal Common Law and Interstate Pollution*, 85 HARV. L. REV. 1439 (1972), for the state of the problem as it existed prior to the *Illinois v. Milwaukee* case.

[23] 356 F. Supp. 556 (N.D. Ill. 1973).

[24] *Id.* at 558.

[25] *Id.*

[26] 441 F.2d 236 (10th Cir. 1971).

[27] *Id.* at 240.

Inland Steel pointed out, however, that the cases cited by the court in support of its jurisdiction were inappropriate inasmuch as those cases dealt only with the situation in which the action was prosecuted in federal court under federal common law. The cases cited by the court did not deal with the issue of whether federal standards, either under the Water Pollution Control Act or federal common law, preempted conflicting state standards. The court refuted this argument by relying on *Ohio v. Wyandotte Chemicals Corp.*[28] In that case, the Supreme Court, declining to exercise its jurisdiction said:

> The courts of Ohio, under modern principles of the scope of subject matter and *in personam* jurisdiction, have a claim as compelling as any that can be made out for this Court to exercise jurisdiction to adjudicate the instant controversy, and they would decide it under the same common law of nuisance upon which our determination would have to rest.[29]

The Illinois trial court's opinion, nevertheless, ignores the Supreme Court's construction of *Wyandotte* given in *Illinois v. Milwaukee.*[30] The *Milwaukee* Court said that federal policy is " 'to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution.' But the Act [Water Pollution Control Act] makes clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters."[31] A footnote with regard to the Act then points out that the contrary indication in *Wyandotte* was based on the preoccupation of that litigation with public nuisance under Ohio law, not the federal common law of nuisance.[32] Thus, the trial court relied on a case with very tenuous precedential value. The frailty of the trial court's holding on the jurisdictional issue undermines the propriety of entertaining this cause of action as a vehicle for applying a local set of pollution control standards against a corporation operating under the guidelines of the locality in which it is located.

The discrepancy among the standards for pollution control is most readily apparent in the section of the Illinois trial court's opinion concerned with the imposition of penalties. One of the factors which should have had an effect upon the computation of penalties would have been a showing of compliance by the defend-

[28]401 U.S. 493 (1970) (suit for abatement of a nuisance due to contamination and pollution of Lake Erie by means of its tributaries).

[29]*Id.* at 500.

[30]406 U.S. 91 (1972).

[31]*Id.* at 102.

[32]*Id.* at 102 n.3.

ant with federal and Indiana standards. Therefore, a review of those standards would have been in order; nevertheless, the trial court chose not to address their relevance.

The Federal EPA had approved Inland's current and proposed pollution control programs shortly before the trial court decision. Inland believed the permit granted was the first such issued to a steel mill on the Great Lakes.[33] The second set of standards which the trial court did not consider were those set by the Indiana Stream Pollution Control Board.[34] The Federal EPA granted Indiana's request for approval of its program for controlling discharges of pollutants into navigable waters in accordance with the National Pollutant Discharge Elimination System (NPDES), pursuant to the Federal Water Pollution Control Act.[35] The Act establishes a permit system under which the Administrator of the Federal EPA may issue permits for the discharge of any pollutant, upon condition that the discharge meets the applicable requirements of the Act.

In spite of the existing federal and Indiana standards, the Illinois trial court elected to apply those of the Illinois statute.[36] This decision was made without consideration of the acceptance by the federal and Indiana regulatory agencies of Inland's facilities and programs and the consideration given by those agencies to Illinois water quality standards protecting Lake Michigan and the drinking water supply of Chicago.

Furthermore, the resulting pollution restrictions for Inland are proportionately higher than those allowed in the out-of-court settlement between Illinois and Youngstown Sheet and Tube Company.[37] Inland, therefore, argued in the trial court that the standard imposed upon it was discriminatory since Inland's production is nearly three times that of Youngstown's, and the Youngstown facility is thereby given a preference and competitive advantage. The trial judge responded that

> Inland cannot regard its vast size as a valid reason for the discharge of pollutants on a proportionate basis. . . . Moreover, it is a fundamental principle of fairness that

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[33]Chicago Tribune, Sept. 10, 1975, at 2, col. 6.

[34]*See* CCH POLLUTION CONTROL GUIDE ¶ 19,532 (1975).

[35]33 U.S.C.A. § 1342(b) (Cum. Supp. 1976).

[36]Inland was allowed a maximum daily discharge of solids, 9,300 pounds, and of oil, 5,950 gallons.

> The maximum daily discharges of phenol, ammonia and cyanide permitted shall be 1½ times the daily maximum amounts of these pollutants permitted to be discharged under the Youngstown agreement in its out-of-court settlement.

72-CH-259, 67-CH-5682 (Cir. Ct. Cook County, Ill., Sept. 8, 1975) at 20.

[37]CCH POLLUTION CONTROL GUIDE, NEWSLETTER 654-55 (Sept. 9, 1974).

> the greater the power, the greater the responsibility to prevent such power from injuring others.[38]

By applying its own set of standards for pollution control, the trial court satisfied itself that Inland was liable under the Illinois statute.

It is interesting to note a statement made by Ira Markwood, director of the Illinois EPA's public water supply division, in which he said that the drinking water regulations adopted by the Illinois Pollution Control Board should meet the requirements of the Federal Safe Drinking Water Act requirements.[39] According to Mr. Markwood, the Illinois regulations "are very close to what probably will be required by the Act [Water Pollution Control Act]."[40] In addition to raising a reasonable doubt about the trial court's determination that Inland was in violation of the Illinois Environmental Protection Act, Mr. Markwood's comment also brings up the point of the propriety of the trial court's imposition of damages.

Because of Inland's position as the largest integrated steel plant in the world, it is difficult to compare meaningfully its fine with those imposed on other corporate polluters. However, when compared with previous fines imposed by the Illinois EPA,[41] the attorney general's request for damages from 1967 seemed to Inland to be imbued with a punitive character. The Illinois Act,[42] the defendant contended, was not intended to be so construed. As stated in the opinion of the trial court,

> Defendant further maintains that the Attorney General is seeking to punish Inland because it refused to accept the settlement on the terms offered by the Attorney General and chose instead to defend itself at trial.[43]

Upon hearing the arguments, the court held that discovery and basic proof must be limited to matters which followed the effective date of the Illinois Act, July 1, 1970. The MSD case, filed in 1967, became truly active when it was consolidated in the court with the State's case, filed in January, 1972. As the court found the defendant to have been in constant violation of the Act since the effective date, it levied a fine totalling $1,905,000.

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[38] 72-CH-259, 67-CH-5682 (Cir. Ct. Cook County, Ill., Sept. 8, 1975), at 15.

[39] 5 BNA Envir. Rptr. 1695 (Nov. 1974—Apr. 1975).

[40] *Id.*

[41] *See* 4 BNA Envir. Rptr. 898-99 (May 1973—Nov. 1973).

[42] ILL. ANN. STAT. ch. 111½, § 1012(a) (Smith-Hurd Cum. Supp. 1975-76).

[43] 72-CH-259, 67-CH-5682, (Cir. Ct. Cook County, Ill., Sept. 8, 1975) at 13.

The court then addressed the matter of the imposition of penalties. Citing *Reserve Mining Co. v. United States,*[44] the court vested the defendant's officers and directors with the responsibility of insuring an abatement of pollution to the extent required by the decree. *Reserve Mining* is also relevant to *Inland Steel* in a way not recognized by the trial court. The *Reserve Mining* court understood that it did not have the expertise to prescribe the precise scientific processes to be used. In its ruling, however, the Illinois trial court ignored the point in the *Reserve Mining* case which addressed itself to the crucial and equitable balancing of the health and environmental demands of society at large against the economic well-being of those parties and local communities immediately affected.[45] Since Inland employs more than 23,000 persons, pays $410 million in wages and pays taxes to the State of Indiana of almost $12 million a year,[46] it would seem that the Federal EPA in conjunction with the Indiana Stream Pollution Control Board would be the authorities best able to provide the equitable judgment necessary on behalf of the public-interest groups and others directly involved.[47]

The trial court substantiated its ruling with case law on the issues confronted. However, the use of the Illinois forum does not do justice to the more imperative socio-economic interest of the parties more directly involved with the pollution nuisance. Indiana, its communities and interest groups have already made a value judgment of the pollution's impact environmentally and economically on the community. Expertise, political considerations, and analysis of normative goals all contributed to the formulation of Indiana standards in the first place. Therefore, the responsibility for judging the relative value in such a decision on either an economic or environmental plane should be vested in an authority which can be attuned to the conflicting interest groups' needs.

Besides establishing a precedent of extreme punitive damages, the most important impact of this case on the development of water pollution law is that it highlights and adds to the proliferation of water pollution standards. Compliance with the law by industry is, therefore, that much more difficult to accomplish. Perhaps the solution was stated in *Dunlap Lake Property Owners Association v. City of Edwardsville:*[48]

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[44]498 F.2d 1073 (8th Cir. 1974).

[45]*Id.* at 1077.

[46]72-CH-259, 67-CH-5682, (Cir. Ct. Cook County, Ill., Sept. 8, 1975), at 15.

[47]For analogous underlying political motives, see Green, *Obstacles to Taming Corporate Polluters: Water Pollution Politics in Gary, Indiana,* 3 ENVIORONMENTAL AFFAIRS 199 (1974).

[48]22 Ill. App. 2d 95, 159 N.E.2d 4 (1959).

> Pollution of public waters of this State is a matter of public concern; but its control and abatement are best left to the specialized agency therewith concerned except in cases of flagrant and obvious pollution.[49]

It was the Illinois trial court's perogative to supersede the Federal EPA's and the Indiana Stream and Pollution Control Board's judgmental expertise with its own conclusion that this case was one of flagrant and obvious pollution. However, Justice Harlan's conclusion in *Ohio v. Wyandotte Chemical Corp.*[50] was worthy of consideration in deciding the *Inland* case:

> To sum up, this Court has found even the simplest sort of interstate pollution case an extremely awkward vehicle to manage. And this case is an extraordinarily complex one both because of the novel scientific issues of fact inherent in it and the multiplicity of governmental agencies already involved. Its successful resolution would require primarily skills of factfinding, conciliation, detailed coordination with—and perhaps not infrequent deference to—other adjudicatory bodies, and close supervision of the technical performance of local industries. We have no claim to such expertise or reason to believe that, were we to adjudicate this case, and others like it, we would not have to reduce drastically our attention to those controversies for which this Court is a proper and necessary forum. Such a serious intrusion on society's interest in our most deliberate and considerate performance of our paramount role as the supreme federal appellate court could, in our view, be justified only by the strictest necessity, an element which is evidently totally lacking in this instance.[51]

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[49] *Id.* at 96, 159 N.E.2d at 6.
[50] 401 U.S. 493 (1971).
[51] *Id.* at 504.